

Volume 11

Pages 2332 - 2449

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	San Francisco, California
)	April 27, 2012

TRANSCRIPT OF PROCEEDINGS - JURY INSTRUCTION CONFERENCE

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(Appearances continued on next page)

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PROCEEDINGS

P R O C E E D I N G S

APRIL 27, 2012

1:59 p.m.

(Proceedings held in open court, outside
the presence and hearing of the jury.)

THE COURT: Okay. Ready to go?

MR. JACOBS: Ready, your Honor.

MR. KWUN: Ready, your Honor.

THE COURT: Who is going to be the principal
spokespersons.

MR. JACOBS: I will be the principal spokesperson for
our side, your Honor.

MR. KWUN: And I will be for Google, your Honor.

THE COURT: Here is the drill. You all have the
document that was sent out yesterday that has the proposed
charge and you've already commented on it in part, but now what
we will do is go through every single paragraph and I will give
you a chance to say, "object" or "not object" or maybe you
might want to modify something, or you might see a typo,
something that just to make it even better. So that's the way
we'll do it.

And then at some point where it's logical, or at the
end if there is no logical place, if there is something you
want to add that is not in here, you should bring it up.

All right?

1 So I will just say "paragraph," like "Paragraph 1,"
2 and then you tell me whether or not you have any objections.

3 So, here we.

4 **THE COURT:** Paragraph one.

5 **MR. JACOBS:** No objection, your Honor.

6 **MR. KWUN:** No, objections, your Honor.

7 **THE COURT:** Two?

8 **MR. KWUN:** No objections, your Honor.

9 **MR. JACOBS:** Same.

10 **THE COURT:** All right. Three.

11 **MR. KWUN:** No objections.

12 **THE COURT:** Let's go back -- let's go back to No. 2
13 for a second, because there were some things that I did not
14 read to the jury as admitted facts or something.

15 **MR. BABER:** Deemed facts.

16 **THE COURT:** Deemed facts.

17 **MR. JACOBS:** I don't think they will know what that
18 is.

19 **THE COURT:** So why don't I say, "any stipulated
20 facts" or "facts I told you were admitted"?

21 **MR. BABER:** "Deemed admitted"?

22 **MR. KWUN:** I just don't remember what was in the
23 transcript.

24 **MR. BABER:** Your Honor, I think some of them, like
25 the names one, is a question of law. "Matters deemed

1 admitted." "Matters that I told you were deemed established
2 or" -- no, that wasn't it.

3 **THE COURT:** I didn't say they were established.

4 **MR. KWUN:** You did not say they were established.

5 **THE COURT:** I didn't go that far. I'll just say,
6 "facts..."

7 **MR. KWUN:** "Facts or issues"?

8 **THE COURT:** No. "Fact I told you were..."

9 **MR. BABER:** "Had been deemed to be evidence"?

10 **MR. KWUN:** I think you said "evidence."

11 **THE COURT:** All right. I would say deemed -- "facts
12 I told you were deemed to be evidence." How is that?

13 **MR. JACOBS:** That's acceptable, your Honor.

14 **THE COURT:** Okay. Number three.

15 (No response.)

16 **THE COURT:** Three. Speak up now. Any objection?

17 **MR. KWUN:** No objections.

18 **MR. JACOBS:** You know, the only thing about this,
19 it's one that's a bug in the general way we think about this.
20 You said it orally correctly, which is, of course, if a lawyer
21 on cross-examination makes a statement and the witness agrees
22 with it, then that is evidence. And you explained that, your
23 Honor, when you were explaining how this works.

24 The standard formulation "what lawyers say is not
25 evidence" doesn't capture that and there were a lot of good

1 facts elicited on cross in this trial.

2 **MR. KWUN:** Your Honor, I think that's actually
3 encompassed in instruction two.

4 **THE COURT:** I do say in number two:

5 "A suggestion in the question by counsel or the
6 Court is not evidence unless it is adopted by the
7 answer."

8 **MR. JACOBS:** Thank you, your Honor.

9 **THE COURT:** Doesn't that pick it up?

10 **MR. JACOBS:** Yes.

11 **THE COURT:** All right. Any other points on number
12 three?

13 **MR. KWUN:** I don't know that it's necessary, but if
14 you want to get into the details, you could also address the
15 fact that depositions read into evidence are evidence.

16 **MR. JACOBS:** I think that's --

17 **THE COURT:** I already said that in No. 2-1.

18 **MR. KWUN:** Oh, you're right. Okay.

19 **THE COURT:** Next. Number four.

20 (No response.)

21 **THE COURT:** You've got to speak up.

22 **MR. KWUN:** No objections.

23 **MR. JACOBS:** No objection, your Honor.

24 **THE COURT:** Number five.

25 **MR. KWUN:** No objections.

1 **MR. JACOBS:** No objection.

2 **THE COURT:** Six.

3 **MR. KWUN:** No objections.

4 **MR. JACOBS:** No objection.

5 **THE COURT:** Number seven.

6 **MR. KWUN:** No objections.

7 **MR. JACOBS:** No objection.

8 **THE COURT:** Now, before this goes to final, we will
9 fix it so that no number appears at the bottom of the page like
10 on this draft. This is just a draft.

11 Okay. Number eight.

12 **MR. KWUN:** No objection.

13 **MR. JACOBS:** No objection.

14 **THE COURT:** Number nine, "Java Documentation."

15 **MR. KWUN:** No objections.

16 **MR. JACOBS:** No objection.

17 **THE COURT:** Ten.

18 **MR. KWUN:** No objections.

19 **MR. JACOBS:** "Charts and summaries" --

20 **THE COURT:** Have any charts and summaries been
21 received in evidence?

22 **MR. KWUN:** There have been, your Honor. There's
23 been -- Dr. Reinhold had a summary of his investigation, for
24 example, that was received into evidence.

25 **THE COURT:** All right. Then we should have number 10.

1 **MR. JACOBS:** I think it mischaracterizes where we
2 are. May I ask what counsel is thinking of?

3 **MR. KWUN:** There is his investigation of what methods
4 he says -- what classes he said are required by the compiler or
5 required by the language spec. There's also your list of what
6 are the packages at issue. I mean, there's a few things like
7 that. Those are the ones that come to mind.

8 **MR. JACOBS:** It seems to over-criticize those kinds
9 of documents.

10 "Charts and summaries are only as good as the
11 underlying supporting material or testimony pursuant
12 to which they came into evidence."

13 **THE COURT:** I can say "testimony or material." How
14 is that?

15 **MR. JACOBS:** Good.

16 **MR. KWUN:** That's fine, your Honor.

17 **THE COURT:** All right. Number 11.

18 **MR. KWUN:** No objections.

19 **MR. JACOBS:** No objection.

20 **THE COURT:** 12.

21 **MR. KWUN:** No objections.

22 **MR. JACOBS:** No objection.

23 **THE COURT:** 13.

24 **MR. KWUN:** No objection -- 13. 13, yeah. Your
25 Honor, you have in here that:

1 "Oracle seeks damages against Google for alleged
2 copyright infringement."

3 We would request that you identify that they "seek
4 damages and an injunction for alleged copyright infringement."

5 **THE COURT:** I will say "seeks relief." Because I
6 don't want to get into the problem of the jury thinking, Oh,
7 the judge will fix this by issuing an injunction so we don't
8 have to award damages.

9 It is true that both are being sought, but what is of
10 concern to the jury is damages. But there could be an
11 injunction, so I'll change that word to "relief."

12 Any objection to that?

13 **MR. JACOBS:** No, your Honor.

14 **MR. KWUN:** No objection.

15 Also, your Honor, you have a sentence that starts,
16 "To the extent that you find liability..." We would request
17 that you just say, "If you find liability." I think it is
18 easier for the jury.

19 **THE COURT:** All right. That's fine. And that's
20 because I got the "extent" phrase already in the last part of
21 that anyway. So that's redundant. All right. "If" is better.

22 Anything else on 13?

23 **MR. BABER:** Your Honor, in the second sentence it
24 starts, "Google denies infringing any such 'copyright'
25 material."

1 **THE COURT:** Yes.

2 **MR. BABER:** Could we change that to, "Google denies
3 infringing any 'copyrighted' material."

4 **THE COURT:** That's what I meant to say.

5 **MR. BABER:** Thank you, your Honor.

6 **THE COURT:** I want you to help me find things like
7 that because it's a challenge for us to catch all those little
8 glitches like that.

9 Okay. What else on 13?

10 **MR. KWUN:** I don't think we have anything else, your
11 Honor.

12 **THE COURT:** How about the plaintiff?

13 **MR. JACOBS:** No, your Honor, not on 13.

14 **THE COURT:** All right. Now we go to number 14.

15 **MR. JACOBS:** 14 has a lurking ownership issue which
16 may be addressed when we get to ownership. But it says:

17 "The term 'owner' includes the author of the work
18 or someone who has purchased the copyright."

19 That could be confusing because Mr. Reinhold, of
20 course, testified that he did the work, but he's not the
21 author. So the "author" or "the employer of the author" or
22 something like that would help.

23 **THE COURT:** All right.

24 **MR. KWUN:** So, I'm sorry. What are you proposing?

25 **MR. JACOBS:** "Includes the author or the author's

1 employer."

2 **MR. KWUN:** Well, it doesn't necessarily include the
3 author's employer.

4 **MR. JACOBS:** It does.

5 **MR. KWUN:** Well, no. I mean, it would depend. If
6 you're an author and you're employed by someone, it doesn't
7 mean that your employer --

8 **THE COURT:** If it's written in the scope of your
9 employment.

10 **MR. KWUN:** Even then, you would have to have an
11 assignment --

12 **MR. JACOBS:** That's not true.

13 **THE COURT:** But in this case, in this case --

14 **MR. JACOBS:** In this area of law, literary works,
15 there is no need for written assignment from employee to
16 employer.

17 **MR. BABER:** Where in the instructions is the --

18 **MR. KWUN:** We're in 14.

19 **MR. BABER:** 14? Okay.

20 **MR. KWUN:** Last sentence, "the term 'owner'
21 includes."

22 **MR. JACOBS:** But my suggestion would be, your Honor,
23 that maybe we just kick this sentence for now. We don't
24 exactly know -- I raised with Mister -- with Google's counsel
25 where they are going on ownership for that ownership paragraph

1 and maybe we could address it there.

2 **THE COURT:** Well, I will -- so you're saying take
3 that whole sentence out here?

4 **MR. JACOBS:** Yes.

5 **MR. KWUN:** Or at least a further consideration of it
6 pending...

7 **THE COURT:** All right. I will -- remind me now not
8 to drop the ball on this. I'm sure you will.

9 Okay. Number 15 --

10 **MR. BABER:** Your Honor, still on 14?

11 **THE COURT:** Sure.

12 **MR. BABER:** Could I suggest just for consistency with
13 the statute, the first sentence, it says:

14 "By federal statute copyright is an exclusive
15 right to copy a work."

16 I think technically it's:

17 "By federal statute copyright includes a number
18 of exclusive rights with respect to the work."

19 The right to copy is only one of six. So a copyright
20 is actually much more than a right to copy.

21 **THE COURT:** Well, isn't that all that's at stake
22 here?

23 **MR. BABER:** Well, but then you spell out -- the ones
24 that are in here are four of the six in the statute. So it's
25 sort of inflating things.

1 **THE COURT:** I thought putting in the entire statute
2 of things that don't have any relationship to this case would
3 just confuse --

4 **MR. BABER:** Oh, absolutely agree with that, your
5 Honor. We don't need any more categories. I just was
6 quibbling with the first two sentences where you equate the
7 copyright with just the right to copy.

8 **THE COURT:** Well, all right. Why don't I say,
9 "Copyright" --

10 **MR. BABER:** "Includes."

11 **THE COURT:** (Continuing) -- "includes an exclusive
12 right."

13 **MR. BABER:** (Continuing) -- "a number of exclusive
14 rights."

15 And then the four, it says, "These rights include."
16 It includes all four of them. Those are four of the six.

17 **THE COURT:** You must be a plaintiff in another case
18 and you want to use this.

19 (Laughter.)

20 **THE COURT:** All right. I'll make those changes.

21 **MR. BABER:** And then in little two under that.
22 "Recast, transform or adapt the work." The word "or."

23 **THE COURT:** Is "or" in there? It's not? All right.
24 Fine.

25 Anything more on 14?

1 **MR. JACOBS:** No, your Honor.

2 **THE COURT:** 15.

3 **MR. KWUN:** No objections your Honor.

4 **MR. JACOBS:** No objections your Honor.

5 **THE COURT:** 16.

6 **MR. JACOBS:** 16 just a wording suggestion. The
7 parenthetical "except in certain circumstances I will describe
8 below." It's not exactly sure -- it's not exactly clear later
9 on that you're referring back to this parenthetical, so we
10 would just suggest take out the parenthetical.

11 **MR. KWUN:** Your Honor, we would object to taking out
12 the parenthetical because it renders the statement incorrect.

13 **THE COURT:** Well, the only defense later on addressed
14 is fair use, right?

15 **MR. KWUN:** Well, I mean, your Honor, the only --
16 there's other circumstances, however, where it still would not
17 be infringement; such as, if it's not substantially similar; if
18 it's for the documentation, as you have it framed right now; if
19 it's not virtually identical; if it is diminimus.

20 **MR. JACOBS:** As stated:

21 "The owner of a copyright has the exclusive right
22 to make copies of all or part of the copyrighted
23 work."

24 That seemed pretty clear to us in 16.

25 **MR. KWUN:** I would suggest if somebody makes a copy

1 of any part of the work, that that is an infringement unless
2 you have the parenthetical.

3 **THE COURT:** Well, let's just take that whole sentence
4 out and go with the first sentence. Can you both agree to
5 that?

6 **MR. BABER:** Well, there's a -- the second line should
7 be "all or part" instead of "of part." Right? I think.

8 **THE COURT:** That should say "all or," correct.

9 **MR. KWUN:** Bruce is in charge of all typos.

10 **MR. BABER:** And I do think in that context, your
11 Honor, the "or part" is misleading because then it will just
12 say:

13 "As stated, the owner of a copyright has the
14 exclusive right to make copies of all or part of the
15 copyrighted work."

16 So, in theory, if you copied five words, that's part
17 of the copyrighted work.

18 **THE COURT:** All right. All right. Just a second.
19 The diminimus thing, I put the burden on the plaintiff,
20 didn't I?

21 **MR. BABER:** You did, your Honor.

22 **THE COURT:** All right. So I want to say -- I'll just
23 say, "make copies of all or more than a diminimus part."

24 **MR. BABER:** Your Honor, if I may make a simpler
25 suggestion?

1 **THE COURT:** What is that?

2 **MR. BABER:** Just, "has the exclusive right to make
3 copies of the copyrighted work." That's what the section says.

4 So that suggests you've got -- the right to copy is
5 really the whole work. If it's less than that, it's a
6 derivative work or it's a part of it or just a little bit that
7 makes it substantially similar, but the --

8 **THE COURT:** Why would it be a derivative? If I were
9 to copy one page out of an important work and it wasn't fair
10 use, why is that derivative?

11 Like the advertisement point. If I start -- if I get
12 them to publish an ad then I make 100 copies of the ad and
13 circulate it, I'm only doing part of it. That's not a
14 derivative work.

15 **MR. BABER:** No. But that would be enough -- if the
16 facts were right, that might be enough to have it be an
17 infringing work, but it still wouldn't be necessarily a copy, I
18 don't think. If taking out "all or part" works, then...

19 **MR. JACOBS:** I think, your Honor, that you're trying
20 to state -- we're trying to state for the jury a basic
21 proposition in Paragraph 16 that will be unpacked in later
22 paragraphs. This is trying to say, this is what the word
23 "infringement" means. Because I suspect the word
24 "infringement" will be used in closing argument. It's an
25 important paragraph.

1 **MR. KWUN:** Your Honor, I think "infringement"
2 actually is defined -- is better defined later on when we
3 provide the test for it.

4 I mean, if we're going to reduce this to one
5 sentence, I think that instruction 14 actually sufficiently
6 states what --

7 **THE COURT:** I'm going to say, "more than a diminimus
8 part."

9 **MR. KWUN:** Your Honor, I think that prejudices the
10 infringement question, which is -- which requires substantial
11 similarity, and that's also their burden of proof.

12 **MR. JACOBS:** I think the -- well.

13 **MR. BABER:** Your Honor, the statutory language is
14 that:

15 "The copyright owner has the exclusive right to
16 reproduce the copyrighted work in copies or in phone
17 records."

18 You don't need phone records in this case. This is
19 just saying, "to reproduce the copyrighted work in copies."

20 **THE COURT:** No. You two are trying to get me to
21 argue your case for you to the jury, but I have a new way to do
22 this. Hang on a minute.

23 (Brief pause.)

24 **THE COURT:** Okay. Here is what I'm going to say:

25 "As stated, the owner of a copyright has the

1 exclusive right to make copies of all or more than a
2 diminimus part of the copyrighted work, subject only
3 to the right of the public to of all or part of any
4 copyrighted material as will be explained below."

5 All right?

6 **MR. BABER:** Fine by us, your Honor.

7 **MR. JACOBS:** Yes, your Honor.

8 **THE COURT:** Great.

9 Number 17.

10 **MR. JACOBS:** 17 raises -- we object. It races
11 concerns about how the jury could be readily confused.

12 The Court should and will in these instructions tell
13 the jury that which is protectable and that which is not. So
14 to restate in 17 the idea expression dichotomy and to include
15 method of operation, process system and the game example is to
16 invite confusing argument and confusing deliberations.

17 **MR. KWUN:** Your Honor, the model instructions include
18 an idea expression instruction. We think it's appropriate.

19 **THE COURT:** I'm going to give this. I -- I want to
20 explain why. There is an exceedingly high risk that a jury in
21 this case will think that because Oracle put -- not Oracle.
22 Sun put so much money and time into this, that there must be
23 some form of federal protection in it and, you know, treat it
24 like a patent or something, and it's not true.

25 There will be somebody on that jury tempted to say,

1 "Well, Sun is the one that came up with this idea. Sun is the
2 one that came up with this." And they will over -- they will
3 expand beyond any bounds of what a copyright is supposed to
4 protect. And we need to remind them, no, copyright protects
5 the expression. It does not protect the idea.

6 And my intent was to cure the legal problem -- not
7 legal problem, but cure the -- to define them, tell them,
8 instruct them that they must treat SSO as subject properly to
9 copyright.

10 Now, there is a very tough issue there that I will
11 eventually resolve, but I think this is a correct statement of
12 the law, and it does -- and I believe it is necessary to
13 prevent the jury from overinflating what a copyright is
14 supposed to protect.

15 So your objection is noted. Overruled.

16 **MR. KWUN:** Your Honor, in the same vein as what you
17 have in here, I think given the arguments and the testimony
18 that we've heard, there has been a lot of testimony from Oracle
19 about the amount of effort it took to create these APIs and the
20 amount of work that went into it, and we would request that you
21 have a sweat of the brow instruction in informing the -- I
22 mean, the language we would request is:

23 "A copyright does not protect any hard work or
24 effort that may have been expended in compiling
25 unprotected elements."

1 And if you want to give a further explanation, you
2 can go on:

3 "This work or effort is sometimes referred to" --

4 **THE COURT:** No. I was already thinking about that as
5 a possibility, but I haven't done it yet. And I would have to
6 be -- I'll think about it.

7 **MR. JACOBS:** Then, your Honor, I think --

8 **THE COURT:** There is a risk there of -- it depends on
9 -- in a way it depends on -- this is one reason that judges
10 sometimes -- I mean, always -- shouldn't say "always," but
11 usually instruct after the arguments because if I were to hear
12 a sweat of the brow argument from Oracle, even if it wasn't in
13 the draft, I would put it in there because arguments like
14 that -- if you invite it, I'll just change the instructions and
15 put in something that said:

16 "You heard of the sweat of the brow argument.

17 That is a bogus argument under the law."

18 And I would do that, because you can't -- you
19 can't -- merely because we don't put something in the
20 instructions means you have a license to run roughshod over
21 what the law would be. I'm not saying that you would do that,
22 but I have not yet decided whether or not a sweat of the brow
23 type instruction ought to go in here. Possibly, but I'm still
24 thinking about that one.

25 So your request is noted. Not yet granted.

1 **MR. KWUN:** We would also request, there has been a
2 lot of testimony about this alleged creativity in the design.
3 But the proper question for copyright is whether there is
4 creative expression. And we would request an instruction that
5 originally creative ideas are not copyrightable and that would
6 be --

7 **THE COURT:** Say that again?

8 **MR. KWUN:** That original and creative ideas are not
9 copyrightable.

10 **THE COURT:** Well, I already say that the idea -- see,
11 that's going too far. I already say that the idea -- that's
12 what 17 does. It goes too far arguing your case for you. I'm
13 not going to do that one.

14 **MR. KWUN:** The third point that we would ask in this
15 section is an instruction on the fact that copyright programs
16 are utilitarian articles and that the fact that they are
17 dictated by a function plays a role in how copyrightable they
18 are or that --

19 **THE COURT:** No. That's a legal question for me later
20 on. I'm not going to do that. I think that's an excellent
21 point to be made on Rule 50 and on the legal issue that ought
22 to go up to the Court of Appeals, but I'm not going to give
23 them that. I don't think you need to give them that.

24 All right. 18 --

25 **MR. JACOBS:** Your Honor, on 17?

1 **THE COURT:** Yes, of course.

2 **MR. JACOBS:** I think what -- absent taking it out, I
3 think what the -- the issue lurking here is that we don't have
4 an originality instruction, and this is a take-away instruction
5 without a give instruction.

6 So we haven't explained to the jury how you could
7 have a book that would have original expression in it even if
8 it has rules because of the selection, coordination,
9 arrangement, for example. And so this is our concern with the
10 formulation if it remains in.

11 We don't understand there to be an originality issue
12 remaining in the case, but I guess we'll find that out.

13 **THE COURT:** Well, now, that may be a fair point. I
14 don't want to say yes to that. But if you will give me a half
15 a page that will -- or less, one paragraph that I could
16 evaluate for that purpose, I would be happy to consider putting
17 it in.

18 **MR. BABER:** Your Honor, if I might remind the Court
19 and Mr. Jacobs, there is either a deeming motion or an
20 admission.

21 We admitted that the overall platform works as a
22 whole met the minimal originality requirement for the copyright
23 laws. I think you read that to the jury during the trial.

24 **MR. JACOBS:** We did not ask for it because it's
25 really not the question.

1 **THE COURT:** Well --

2 **MR. JACOBS:** So in any case, your Honor, we'll give
3 you a paragraph on this.

4 **THE COURT:** All right. And I'm not saying for sure I
5 will grant it. I will consider it.

6 Number 18.

7 **MR. NORTON:** Sorry. On 17?

8 **THE COURT:** All right.

9 **MR. NORTON:** In the first sentence there is a typo,
10 which is, "copyright infers ownership over the particular
11 expression."

12 **THE COURT:** Thank you. What's going on with me?

13 Okay. All right. Now what?

14 **MR. KWUN:** Are we moving on to 18?

15 **THE COURT:** 18.

16 **MR. KWUN:** So there is a typo in 18, which is that:

17 "TX 464 is a registration for Java 2 Standard
18 Edition Version 1.4."

19 Not "Java Standard Edition."

20 **THE COURT:** I'm sorry. 464 is what?

21 **MR. KWUN:** In Line 2 on Page 11 you say:

22 "Namely, Java Standard Edition Version 1.4."

23 It's:

24 "Java two Standard Edition Version 1.4."

25 So exactly the same as the next one you have in

1 there, except for the version number.

2 **THE COURT:** I've got it.

3 **MR. KWUN:** And then, your Honor, in Lines 5 to 6,
4 although you state that:

5 "The copyright generally covered the compilable
6 code and documentation for the API packages..."

7 What they actually cover is more than that. We would
8 request that you indicate that they also -- that they generally
9 cover the compilable code, the documentation, the Java virtual
10 machine, the Java compiler and other software tools.

11 **THE COURT:** I will say "among other things the
12 registered copyrights."

13 **MR. BABER:** Your Honor?

14 **THE COURT:** Yes.

15 **MR. BABER:** I just want to make sure that the jury
16 doesn't get the wrong impression by use of the word "cover."
17 I think what you're intending to tell the jury at this point
18 is, look, we have works that include several different things.
19 It's not that the registered copyrights cover something, which
20 sounds like copyrightability coverage. If the sense is that,
21 let me just tell you --

22 **THE COURT:** What word would you use "include"?

23 **MR. BABER:** I would change it to say:

24 "The copyrighted works generally include
25 compilable code and documentation, among other

1 things."

2 **THE COURT:** That's okay with me. Is it okay with the
3 plaintiff?

4 **MR. JACOBS:** I think the point that just got lost is
5 the registration. So, "the registered."

6 **MR. BABER:** I think we call it "the copyrighted
7 works" throughout.

8 **THE COURT:** Well, here. I would say, "The registered
9 copyrights generally include." How is that?

10 **MR. JACOBS:** Yes.

11 **MR. BABER:** It's really the works include all these
12 things, your Honor. What the copyrights include is -- that's
13 the question of law for you. It's the difference between the
14 copyright and the works.

15 **MR. JACOBS:** The -- this is perfectly adequate as
16 stated.

17 **MR. BABER:** You could say, "the works in which the
18 copyrights are registered."

19 **MR. JACOBS:** That's more words. It says the same
20 thing.

21 **THE COURT:** I'm going to -- I will change "cover" to
22 "include," but otherwise it stays the same.

23 **MR. KWUN:** And, your Honor, on the next line, two
24 lines down, Line 7 where you say:

25 "The main issues you must decide concern these

1 two."

2 And then you say:

3 "General types of work contained therein."

4 Since "work" is a term of art, we would -- which is
5 not -- and it's not being referred to work as work as a whole
6 or work as used in the Copyright Act, we would request that you
7 change "work" in that line to "material."

8 **MR. JACOBS:** No objection, your Honor.

9 **THE COURT:** Great.

10 **MR. KWUN:** "General types of material."

11 **THE COURT:** To "general types of material," got it.
12 Anything else?

13 **MR. JACOBS:** In the technical discussion there are a
14 couple of -- we struggled with whether we can do better than
15 compilable code, and we can't. We tried various alternatives.

16 We would note, just in case this bothers the Court or
17 Google, that we're including in compilable code the resulting
18 object code which is a technical --

19 **THE COURT:** That's what I heard people -- is that not
20 correct?

21 **MR. JACOBS:** No. The compilable code would be the
22 source code less the -- what I think the intent here is the
23 compilable code is the source code less the comments. And the
24 compiled code is the resulting object code.

25 This will work for present purposes in terms of what

1 issues the jury has to decide, but I didn't -- I wanted to just
2 aprise the Court of that.

3 **THE COURT:** I did specifically want the resulting
4 object code to be part of this.

5 **MR. JACOBS:** Exactly.

6 **THE COURT:** Because -- well, so --

7 **MR. JACOBS:** One possibility that we thought of -- we
8 can test and see if it works with your Honor and with Google --
9 is "computer code."

10 **MR. KWUN:** I think, your Honor, that "computer code"
11 is ambiguous. And I think we want to capture the fact that
12 this also includes the compiled code. We could say, "the
13 compilable and compiled code."

14 **THE COURT:** Then we are going to have a long phrase
15 each time we want to use it.

16 **MR. BABER:** You can just say, your Honor, how about:
17 "The term 'compilable code' refers to these
18 things (whether in source code or object code
19 format)."

20 **THE COURT:** I say that on Line 10 and 11.

21 **MR. BABER:** Instead of, "as well as the resulting,"
22 which sounds like, well, you have one group and then another
23 group. Just say it covers this whether it's in source code or
24 object code.

25 **THE COURT:** Where would you put that?

1 **MR. BABER:** The part that's in the parenthetical. I
2 would just change "as well as the resulting object code" to
3 "whether in the form of source code or object code."

4 **THE COURT:** I'm good with that. Are you okay with
5 that, Mr. Jacobs?

6 **MR. JACOBS:** I thought your other language was
7 better, but I have no substantive objection.

8 **THE COURT:** Okay.

9 **MR. JACOBS:** So the sentence in this connection.
10 "The source code that implements the function of
11 the API is called the implementation."

12 It's -- you've just -- we've just defined in the
13 previous sentence what API compilable code is and now we're
14 saying, "The source code that influence the function of the API
15 is called the implementation," and those are amiss.

16 **THE COURT:** I'm happy to take out -- I'm happy to
17 change it and say, "Sometimes this has been referred to as the
18 implementation."

19 **MR. JACOBS:** I think that would be clearer.

20 **THE COURT:** Both sides okay with that?

21 **MR. KWUN:** Your Honor, there has been a lot of
22 testimony that defined "implementation code" to exclude the
23 declarations which are not excluded from compilable code.

24 **MR. JACOBS:** And that's just wrong, your Honor.

25 **THE COURT:** Well, but, I mean, there is testimony on

1 this point.

2 **MR. KWUN:** And, your Honor, I actually don't think
3 there has been any -- if there was any testimony to the
4 contrary. So whether Mr. Jacobs thinks it's wrong or not, that
5 actually is our record.

6 **MR. JACOBS:** In any case, our recommendation, your
7 Honor, would be to take that sentence out since you -- the
8 previous sentence refers to an implementation, so
9 implementation is covered there.

10 **THE COURT:** Well, I will consider taking out that one
11 sentence, but if I need the word "implementation" later on, I
12 have to come back to that. I put that in there for a reason
13 and now I'm trying to remember. It had something to do with
14 one of the witnesses yesterday.

15 **MR. KWUN:** Your Honor, just for the record, we think
16 that the sentence explaining what implementation is is useful
17 since it's used in the prior sentence and it -- and for that
18 reason we would request that you keep that sentence.

19 **THE COURT:** Is the difference between you whether the
20 declaration is part of the implementation?

21 **MR. JACOBS:** Yes, your Honor.

22 **MR. KWUN:** Yes, your Honor.

23 The implementation -- I don't think there has been
24 any contrary testimony. The only way "implementation" has been
25 used at trial is to define the material that's inside the curly

1 braces.

2 **MR. JACOBS:** Your Honor, there was testimony, because
3 I elicited testimony that the material in black in the box is
4 part of the code for purposes of what is --

5 **THE COURT:** Is it part of the implementation?

6 **MR. JACOBS:** That's correct.

7 **THE COURT:** Code versus --

8 **MR. KWUN:** Yes, your Honor. I mean, it would be part
9 of the compilable code and I think that that is captured by the
10 instruction.

11 I think that given the amount of testimony that is
12 talked about, the various distinctions, it's very useful to
13 have a word that refers to the material inside the curly
14 braces. It will allow the jury to discuss these things more.

15 **THE COURT:** What if I said something like:

16 "In this connection, the source code implements
17 the function of the API is called the implementation,
18 but be mindful that the two sides disagree on whether
19 the declaration is part of the implementation."

20 **MR. JACOBS:** I think maybe the -- where your Honor
21 started should work.

22 "In this connection, the source code that
23 implements the function of the API has sometimes been
24 referred to as the implementation."

25 **MR. KWUN:** Your Honor, that would be fine.

1 **THE COURT:** It's okay?

2 **MR. KWUN:** Yes.

3 **THE COURT:** All right. Okay.

4 Say that again.

5 **MR. JACOBS:** "Has sometimes been referred" -- "is
6 sometimes referred to as the implementation."

7 **THE COURT:** All right.

8 **MR. JACOBS:** Then in the documentation sentence we
9 have kind of a parallel thought. So it would read as follows:

10 "Instead, the English language comments are part
11 of what I will call the API documentation."

12 Insert, "sometimes referred to as the, quote,
13 specification, close quote."

14 **MR. KWUN:** That's fine, your Honor.

15 **THE COURT:** Wait a minute. "Sometimes referred to as
16 the, quote, specification."

17 **MR. JACOBS:** And then one of the -- on Line 20 is the
18 word "method," and method is going to come up in the
19 instructions and I'm sure argument.

20 One of the problems we have in Paragraph 17 is the
21 reference to "method of operation" and the possible confusion
22 between the statutory class method of operation and the Java
23 programming rubric method.

24 **THE COURT:** Just a minute. Show me -- what line are
25 you on?

1 **MR. JACOBS:** Line 20.

2 **MR. NORTON:** And, also, Line 9.

3 **MR. KWUN:** Your Honor, we also have a similarly
4 confusing term that has been in evidence, although it's been
5 explained in testimony, but "interface."

6 "Interface" is a term of art in Java, but is also
7 used obviously in API. Perhaps we should just have another
8 paragraph that explains that two of the terms that have come up
9 in this case that describe certain aspects of the Java language
10 are "method" and "interface" and that those are distinct from
11 the legal terms "method of operation" or -- I guess, well, the
12 terms "method of operation" and "Application Programming
13 Interface."

14 **MR. JACOBS:** An alternative, your Honor, would be to
15 add as follows:

16 "A 'method' in this context means a software
17 program that performs particular services."

18 **MR. KWUN:** Your Honor, we would object to the
19 characterization of it as a program.

20 **MR. JACOBS:** "Means software that performance
21 particular services."

22 **THE COURT:** Source code.

23 **MR. JACOBS:** And, your Honor, one of the things we
24 did, I want to flag for you, is we went back to your MSJ order,
25 which was -- which has withstood the test of time in this

1 trial.

2 **THE COURT:** What MSJ order? Oh, summary judgment,
3 okay.

4 **MR. JACOBS:** I'm sorry, on copyright. And your --
5 this is the -- this language is adopted from that order, ECF
6 433.

7 "A method in this context means a software
8 program that performs particular services."

9 **MR. KWUN:** Your Honor, I would just note the
10 objection to the term "program" because I don't think that's
11 accurate and it suggests --

12 **THE COURT:** I can change that in a second. Let me
13 give you -- "a method in this context."

14 **MR. JACOBS:** "Means a software program that
15 performance particular services."

16 **THE COURT:** "In this context the term 'method'
17 means." Tell me the rest of it?

18 **MR. JACOBS:** "A software program that performs
19 particular services."

20 **THE COURT:** How about if we say -- "services," I
21 don't like that word. I would say means source code --
22 actually, why don't we say:

23 "Implementation means an implementation to
24 perform a function."

25 **MR. KWUN:** Your Honor, I think a method actually can

1 refer to the implementation or it can refer to the declaration.

2 You have, "a method declaration which," I don't know --

3 **THE COURT:** "Means source code that carries out a
4 function." How is that? Is that okay?

5 **MR. JACOBS:** Yes.

6 **MR. KWUN:** And actually, your Honor, here, in
7 particular, the reference to "method" is actually to method
8 names. So to suggest that that is code is -- I mean, it's
9 somewhat confusing, I think.

10 If we decoupled this from this instruction --

11 **THE COURT:** Oh, I see. Method names.

12 **MR. KWUN:** If we had a separate instruction just
13 saying that:

14 "There are two terms that come up both in terms
15 of technical concepts in Java, in the Java language,
16 as well as in other aspects of the case, and you must
17 keep in mind that method, as used in the Java
18 language, has a different meaning than method of
19 operation; and interface, as used in the Java
20 language, has a different meaning than application
21 programming interface."

22 It would avoid the juxtaposition with the method name
23 there.

24 **THE COURT:** You know, how about if we say "English
25 language comments as well as method name..." I'm going to put

1 in the word "names." ... "method names and class names."

2 I think there has been -- I don't think we need any
3 more definitions. The jury knows good and well what a method
4 is and for me to try to now explain that to them -- let you two
5 fight over that.

6 **MR. KWUN:** That's fine with us, your Honor.

7 **THE COURT:** I'm going to leave out any further
8 description.

9 What was the other point that you wanted to have?
10 "Interface." No, I'm not going to put that in either. That's
11 for argument. Just argue from the facts in the record what
12 "interface" means.

13 All right. What's next?

14 Now, I will say this if anybody in the closing
15 argument even halfway suggests that these methods are methods
16 of operation and, therefore, the statute doesn't even cover it,
17 then I'm going to interrupt and say that's a bogus argument and
18 you will wish that you had not made that argument.

19 **MR. KWUN:** We will not, your Honor.

20 **THE COURT:** All right. So don't even go there. But
21 I think the jury will understand -- now, that is a legitimate
22 possible argument on Rule 50, but it's not for the jury
23 argument because I am telling them the SSO is a permissible
24 copyright.

25 Okay. Anything more on 18?

1 **MR. JACOBS:** No, your Honor.

2 **THE COURT:** 19?

3 **MR. JACOBS:** Our concern with 19, your Honor, is
4 there is -- maybe just could be the way this draft came out,
5 but there's too much rumination in the instruction. The kind
6 of -- the jury should be told what the law is.

7 You've told the parties that your decision on the
8 scope of protection is provisional and you're going to look at
9 it again after we're all done. The parties need to know that.
10 The jury doesn't really need to know that. The juries should
11 just be instructed and told -- and make its decision.

12 In addition, there's probably, in our view, too much
13 characterization of Google's argument. So we would propose as
14 follows. On Line 8 and 9:

15 "Google states that its use was protected by a
16 statutory rule permitting the public to make fair use
17 of copyrighted works."

18 And then jump all the way to 14:

19 "For purposes of your deliberations the
20 copyrights cover the Structure, Sequence and
21 Organization of the compilable code."

22 **MR. KWUN:** Your Honor, this is essentially the topic
23 we briefed the other night and we would -- well, we disagree.
24 We think that it's important that the jury know that this
25 decision hasn't been reached and that the Court has not

1 declared that what Oracle has been telling them is correct.

2 **THE COURT:** Well, I have, I think, the authority to
3 do that even though, it's true, I haven't yet made that
4 decision.

5 I don't have to do it the way Google wants, but I
6 don't want anyone to have some -- I don't like the way I
7 phrased this. "I will not be able to decide this question
8 until after your verdict job."

9 **MR. KWUN:** Your Honor, we would just recommend
10 deleting "be able to." "I will not decide this question."

11 I don't know if that addresses the concern that you
12 seem to have on that, but shortens the sentence and get us to
13 the point.

14 **MR. JACOBS:** It's odd.

15 **THE COURT:** Hmm?

16 **MR. JACOBS:** I think it's just odd. Here are your
17 instructions, but I'm not sure these instructions are right.
18 What kind are verdict are we eliciting from them?

19 **MR. BABER:** Your Honor, I don't think that conveys to
20 the jury that, "Here are my instructions. I don't know if they
21 are right."

22 You're just saying, the issue of copyrightability.
23 I'll deal with that. For purposes of your job, just assume
24 that it is copyrightable. And we think this fairly does that.

25 **THE COURT:** Well, I am going to take the sentence out

1 that says, I will not be able to do that, and leave the rest of
2 it there. And I don't think anyone is prejudiced one way or
3 the other by this.

4 **MR. JACOBS:** So in Line 9 this --

5 **THE COURT:** I think I should tee up the arguments
6 that are being made. Is there something wrong? You call it
7 ruminations. That's not a legal objection.

8 I have the right -- I think sometimes the duty -- to
9 help explain to the jury what the issues are. And is there
10 something that's inaccurate about 19?

11 **MR. KWUN:** Your Honor, we would add something that we
12 think is inaccurate, which is that right now instruction 19
13 does not explain to the jury that one of the issues you're
14 going to have to decide is substantial similarity.

15 It says that:

16 "Google states that the elements it has used are
17 either not copyrightable in the first place or its
18 use was protected by fair use."

19 But there's actually three things. We say that --
20 that the material is not copyrightable; that it's not
21 infringing; and that even if there is a prima facie case of
22 infringement, it's a fair use.

23 So we believe there is a concept between the two that
24 you have there that should be added --

25 **THE COURT:** What would be that phrase?

1 **MR. KWUN:** It would say -- right now it says:

2 "Google states that the elements it has used are
3 either not copyrightable in the first place."

4 Right after that we would add:

5 "Comma, that Google's work and Oracle's work are
6 not substantially similar when compared as a whole,
7 comma."

8 And then the rest of the phrase that you have there.

9 **MR. JACOBS:** So let me -- can I take those one by
10 one?

11 **THE COURT:** Yes.

12 **MR. JACOBS:** Sorry.

13 **THE COURT:** Go ahead.

14 **MR. JACOBS:** On Line 9:

15 "Google states that the elements it has used are
16 not copyrightable in the first place."

17 I guess what you're -- maybe I should run with this.
18 What you're saying to the jury here is you're rejecting
19 Google's argument.

20 I think it invites Google to argue copyrightability
21 to the jury. If they are not going to argue copyrightability
22 to the jury, notwithstanding that the instructions express that
23 this is their argument. Because it's really an argument that
24 they are making to the Court, that they are not copyrightable,
25 not to the jury. Because you're telling the jury not to listen

1 to an argument that these things are not copyrightable.

2 **MR. KWUN:** Well, your Honor --

3 **MR. JACOBS:** The more -- I guess I could live with it
4 either way. I still think the instruction would be better if
5 what the jury was told is: Here is your direction. Decide
6 these questions.

7 **MR. KWUN:** Well, your Honor, you state what the
8 arguments are, although we would suggest there is one missing,
9 and then you state immediately after that that copyrightability
10 is an issue for you to decide. I think it's pretty clear
11 exactly what the issue is. The Court has formulated that
12 correctly.

13 **THE COURT:** I have a better idea. Since neither of
14 you like No. 19, I am going to take that sentence that says:

15 "For purposes of your deliberations, I instruct
16 you that the copyrights in question do cover the
17 Structure, Sequence and Organization of the" -- and
18 I'm supposed to put in "compilable code."

19 Is that it?

20 **MR. JACOBS:** I think just for consistency, your
21 Honor, yes.

22 **THE COURT:** Then I'm going to take that sentence and
23 take it back to Paragraph 17, and it will go at the end of
24 Line 25.

25 **MR. BABER:** Your Honor, I think that's --

1 **THE COURT:** Too bad. You talked me into it with all
2 your other objections. So that's where it's going to go. I'm
3 going to take that.

4 "For purposes of your deliberations I instruct
5 you that the copyrights in question do cover the
6 Structure, Sequence and Organization."

7 I'm going to leave out the fact that you're
8 arguing -- the jury doesn't know that you have been arguing
9 that it's not been covered by copyright. From their point of
10 view you've conceded that and everybody knows that. So I don't
11 need to even inject that.

12 **MR. KWUN:** Your Honor, if you're going to instruct
13 them that they are to, that the copyrights do cover the
14 Structure, Sequence and Organization of the code, of the
15 compilable code, we would request that you add after that:

16 "It is my job to decide whether or not the
17 copyrights on the computer program do or do not
18 extend to protect," blah blah blah.

19 In other words, the sentence that you have before
20 that, because it's -- again, we think it's prejudicial to say
21 to the jury that that issue has been decided, because it
22 hasn't.

23 **THE COURT:** Why not? Why is that? They don't even
24 know it's an issue. It's just like I'm telling them what the
25 statute of limitations is.

1 **MR. KWUN:** Your Honor, they have heard witnesses
2 testify that they believe that they are free to use these
3 and --

4 **THE COURT:** I guess that's too bad. That happens in
5 trials all the time; that one side or the other is -- that the
6 -- no. I don't see how that can possibly prejudice you.

7 **MR. KWUN:** Well, your Honor, when it happens in cases
8 where -- where testimony has been given and then there's a
9 legal determination that that activity was contrary to the law,
10 that's one thing. But there has been no determination here in
11 this case and we think it would be prejudicial to suggest to
12 the jury that there has been.

13 **THE COURT:** Well, the point is noted. In my mind it
14 works the other way. This actually benefits you, because some
15 juries would say, Oh, the judge has already -- he's going to
16 take care of that.

17 So, no. I'm not going to do that. I'm going to tell
18 them that it does cover and you still have all your other
19 arguments. I don't think in puts you in a bad light at all.

20 So, but let's go back to the paragraph where we were.

21 "Google states that the elements it has used" --
22 will take out, "not copyrightable in the first
23 place."

24 "Google states that... it has used are not
25 infringing... Its use was protected by a statutory

1 rule permitting the public, including competitors, to
2 make fair use of copyrighted works."

3 I think that adequately states your position. And
4 it's not prejudicial in any way to you.

5 All right. Do you have more objections?

6 **MR. KWUN:** Yes.

7 **MR. JACOBS:** Well, this --

8 **MR. KWUN:** Go ahead.

9 **THE COURT:** I want to hear the plaintiff's
10 objections.

11 **MR. JACOBS:** "Including competitors," you know, they
12 are arguing that as a competitor, they are entitled to use
13 this. As phrased, it's not clear that that's their argument.

14 And, again, you're going to be instructing them on
15 various --

16 **THE COURT:** I know the inference it might be, well,
17 the public can do it, but those are people who -- how about
18 competitors? The judge didn't say competitors. He just must
19 mean strangers or something. You know, the entire world. How
20 about, why don't I put in "the entire world"?

21 You know, the right to fair use is an important
22 right. It has First Amendment overtones. So I don't want it
23 to --

24 **MR. JACOBS:** How about --

25 **THE COURT:** (Continuing) -- water it down.

1 **MR. JACOBS:** How about just crisper, your Honor.

2 "Protected by a statutory rule permitting the
3 'fair use' of copyrighted works."

4 And later on you're going to explain what "fair use"
5 is.

6 **THE COURT:** I will say "anyone." I'll say
7 "Permitting anyone to make fair use."

8 **MR. JACOBS:** And then how would this end if you --

9 **THE COURT:** That's where it ends, right there now,
10 "Fair use of copyrighted works" period. And then that other
11 sentence about SSO goes back earlier.

12 **MR. BABER:** And, "It is my job" sentence out?

13 **THE COURT:** Which? That sentence will go out.

14 **MR. BABER:** That will go out then. I think that was
15 a mistake to try to explain that.

16 **MR. KWUN:** Your Honor, we would have two other parts
17 in Section 19.

18 **THE COURT:** Sure.

19 **MR. KWUN:** First of all, in the first sentence where
20 you say, "There are more than 37 API packages."

21 **THE COURT:** Yes.

22 **MR. KWUN:** "So does the accused Android platform."

23 **THE COURT:** Sure.

24 **MR. KWUN:** I think that's just going to lead the jury
25 to wonder exactly how many more and we would request that you

1 indicate, "Both platforms have more than 160 API packages."

2 **THE COURT:** There has been evidence on that. I don't
3 need to do that.

4 **MR. KWUN:** The other than thing that we would request
5 is that in light of the change in plaintiff's position on
6 collective work, it's inappropriate on Page 12, Line 5 to say,
7 "individually as 37 separate packages."

8 **THE COURT:** That's true. That's true.

9 **MR. JACOBS:** I'm sorry -- yes, that's correct your
10 Honor.

11 **THE COURT:** So that phrase will come out.

12 **MR. JACOBS:** I think you could simply end it at, "for
13 the 37 API packages period."

14 **THE COURT:** That's what we'll do. That's a very good
15 change.

16 **MR. KWUN:** Well, your Honor, I think as a --

17 **MR. BABER:** It has to stay. Collectively as a single
18 group.

19 **MR. KWUN:** I think that -- otherwise it's going to
20 not --

21 **THE COURT:** We'll say "as a group."

22 **MR. KWUN:** That's fine, your Honor.

23 **MR. JACOBS:** That's fine.

24 **THE COURT:** All right.

25 **MR. BABER:** One typo, your Honor.

1 **THE COURT:** Sure.

2 **MR. BABER:** Line 7, the fifth word "on" should be
3 "in."

4 **THE COURT:** Okay. Thank you for that.
5 Now, 20.

6 **MR. JACOBS:** We briefed 20, your Honor and that's one
7 of our top three. There's potential for uncertainty about what
8 the intent of 20 was.

9 There is uncertainty on our side about what the
10 intent of 20 is because, literally, it says the names of files
11 or packages and there are a lot of names that are at issue and
12 we didn't want to have -- we didn't want to -- we could live
13 with -- our chart and our brief that shows the empty hierarchy
14 is not as empty with just files or names -- with just files or
15 packages, but the selection of names for packages is part of
16 the selection --

17 **THE COURT:** Well, I think I'm willing to put in this
18 language that you requested.

19 "While individual names are not protectable on a
20 stand-alone basis, the names are protectable as part
21 of the Structure, Sequence and Organization of the 37
22 API packages."

23 That's what you requested. Any objection to that?

24 **MR. KWUN:** Your Honor, I don't think it's that the
25 names are protectable. It's that the selection -- that the

1 Structure, Sequence and Organization of the names are
2 protectable. The names were never protectable.

3 **MR. JACOBS:** I think the Court said it well.

4 "Names are protectable as part of the Structure,
5 Sequence and Organization of the 37 packages."

6 **MR. KWUN:** Your Honor, I think that just invites the
7 jury to read out the statement that names are not protectable.
8 I think that the point is that the structure -- the Structure,
9 Sequence and Organization is protectable and if you say that,
10 that says all that needs to be said.

11 **THE COURT:** I'm going to go with this language that I
12 gave you because in the context of everything else, this
13 paragraph says -- I don't think it -- I think it makes both
14 points.

15 **MR. BABER:** Your Honor, could I propose a slight
16 tweak to Mr. Jacobs's language that you're adopting?

17 **THE COURT:** I will listen to you. What is it?

18 **MR. BABER:** To be, "While individual names are not
19 protectable..." And I didn't catch exactly --

20 **THE COURT:** On a stand-alone basis.

21 **MR. BABER:** "...they may be considered as elements of
22 the overall SSO."

23 **MR. JACOBS:** I think that's pretty weak, your Honor.
24 Who is the "may" directed to? The jury now deciding
25 originality on the names?

1 **MR. BABER:** How about this?

2 "While the individual names are not protectable
3 on a stand-alone basis, it is the entire SSO, which
4 includes the names, that..."

5 Whatever you say prior, "are covered by the
6 copyrights."

7 **MR. JACOBS:** I think given the focus in the previous
8 sentences on the names, that is misdirected.

9 **THE COURT:** Mr. Baber, what was your --

10 **MR. BABER:** While the individual names are not
11 protectable on a stand-alone basis, the entire SSO --

12 **THE COURT:** No, no. Your other suggestion. Before
13 that.

14 **MR. BABER:** Oh, before that?

15 **THE COURT:** Something that Mr. Jacobs said was --

16 **MR. BABER:** Yes.

17 "While individual names are not protectable on a
18 stand-alone basis, you may consider the fact that the
19 names are part of the SSO."

20 **THE COURT:** No, that's -- that is too weak.

21 **MR. BABER:** I don't remember what I said.

22 I think the point, your Honor, was that when you have
23 SSO, yeah, you may consider the names to be elements of the
24 overall SSO.

25 **THE COURT:** How about:

1 "Names are a necessary part of Structure,
2 Sequence and Organization."

3 **MR. JACOBS:** I think that the important point --
4 since the previous sentences refer to "cannot be copyrighted,"
5 we need to say -- and, actually, now that I look at it what
6 really needs to be parallel.

7 "Names cannot be copyrighted". Maybe, "Names cannot
8 be protected by copyright." But in any case what we want to
9 say in the sentence that we're urging is that as part of the
10 Structure, Sequence and Organization of the 37 packages, the
11 names are protected by copyright. You're saying they're not in
12 one sentence. We better say they are now that they may be.

13 (Brief pause.)

14 **THE COURT:** Here is the answer.

15 "While individual names are not protectable on a
16 stand-alone basis, names must necessarily be used as
17 part of the SSO spelled out, and are to that extent
18 protected by copyright."

19 **MR. JACOBS:** That's fine, your Honor.

20 **MR. BABER:** I would suggest maybe just -- fine up til
21 the very end, "are to that extent protected as part of the
22 SSO."

23 In other words, not protected alone, only as part of
24 the SSO.

25 **THE COURT:** I am saying, "to that extent."

1 **MR. BABER:** Okay. That's fine.

2 **THE COURT:** "And to that extent protected by
3 copyright."

4 I'm going to go with what I came up with.

5 **MR. BABER:** That's still -- the point, your Honor, is
6 that the names are never protected. They may be protected as
7 part of something -- as you know, it's the SSO that's
8 protected.

9 **THE COURT:** You've got to use symbols in order to
10 have an SSO. It won't work otherwise.

11 So if you have a bunch of blanks in there, Mr. Jacobs
12 is right, it can't work.

13 **MR. BABER:** What about, "It's the overall SSO" --

14 **MR. KWUN:** "Which can include names."

15 **MR. BABER:** (Continuing) -- "which includes the
16 names."

17 **THE COURT:** I like my phrasing.

18 "Names must necessarily be used as part of the
19 SSO and are to that extent protected by copyright."

20 This is the best we're going to be able to do unless
21 in my sleep -- sometimes I wake up at 1:00 a.m. with a better
22 idea.

23 (Laughter.)

24 **THE COURT:** I think this is the best I can do on this
25 one.

1 Okay. So where was that?

2 **MR. JACOBS:** End of 20, your Honor.

3 **THE COURT:** That was the end of 20. Wait a minute.
4 Is that right?

5 **MR. KWUN:** Yes, your Honor.

6 **THE COURT:** Now I wanted this thing in here about
7 Java. Nobody asked for this, but I can just see. I know, I've
8 seen enough off-track reasoning. I know what would happen.
9 They will go in there and say, Well, Java, that belongs to
10 Oracle and they use Java. It's right there in that code.

11 **MR. BABER:** Your Honor, could we put in the -- I
12 think that's a great point.

13 Can we put in the instructions that the parties are
14 in agreement -- I'm asking Oracle.

15 "The parties are in agreement that there is
16 nothing improper about the use of Java in the names
17 of the API elements written in the Java programming
18 language."

19 Or something along those lines. There is no problem
20 with that.

21 **MR. JACOBS:** I propose a simpler answer.

22 **THE COURT:** Which is?

23 **MR. JACOBS:** That:

24 "Although Java has been registered as a
25 trademark, there is no trademark claim in this

1 lawsuit. The name Java cannot be copyrighted, nor
2 can any other name whether one or two words or longer
3 in length."

4 And then we would go to your formulation.

5 **THE COURT:** All right.

6 **MR. BABER:** How about:

7 "Anyone may use Java when referring to the
8 language."

9 **MR. JACOBS:** We don't need to get into the law of
10 nominative, fair use, et cetera.

11 **THE COURT:** I think we're okay. I think Mr. Jacobs'
12 solution works.

13 Okay. All right. Anything more on 20?

14 **MR. JACOBS:** No, your Honor.

15 **THE COURT:** 21.

16 **MR. JACOBS:** Okay. So we briefed this one, too. And
17 perhaps I could read you what we would propose, just as a way
18 of teeing up the issue.

19 "With respect to the API documentation, Oracle
20 contends Google copied the Structure, Sequence and
21 Organization of the 37 API packages and the English
22 language comments into the documentation for the 37
23 API packages in Android."

24 And then we would continue with the next sentence.

25 "Google agrees that there are similarities in the

1 language, but pointing to differences as well, denies
2 that its documentation is a copy of the Java
3 documentation."

4 I think we don't need to have "every Google argument"
5 in here. So we would delete the next sentence and then:

6 "Google, again, asserts the statutory defense of
7 fair use."

8 And we would delete the last sentence.

9 **THE COURT:** Well, here is what I don't -- let me
10 first, what -- does Google, "yes" or "no"?

11 **MR. KWUN:** No.

12 **THE COURT:** Don't get into an argument yet. You
13 don't go for that?

14 **MR. KWUN:** No.

15 **THE COURT:** Here is my concern. The comments are
16 ordinary English prose. It's true that they are in -- they are
17 in the -- like a word processing document, they are embedded in
18 the software, but it's just English. It gets extracted. And I
19 don't see that -- it has any SSO to it. The SSO part comes
20 from the log that deals with computer programs.

21 So if we're going to deal with this as a literary
22 work, like an operating manual, don't we just look at the plain
23 language -- not the plain language, the English language.

24 Now, I know you have this argument about taxonomy and
25 the West code system, keynote system.

1 **MR. JACOBS:** With substantial authority, your Honor,
2 for that proposition.

3 **THE COURT:** Not in the Ninth Circuit. Only just
4 *Easterbrook* in the Seventh Circuit.

5 **MR. BABER:** May I --

6 **MR. JACOBS:** I think one of the points we were
7 driving at in our brief is that this is not just any operating
8 manual. This is an API document derived from a source code
9 and, in fact, the documentation represents the Structure,
10 Sequence and Organization of the source code. That's how it
11 extracted. That is the intent of the documentation.

12 And so the documentation as a -- as documentation for
13 a computer program should have the same scope of protection,
14 the same copyrightable material as the computer program.

15 **MR. BABER:** Your Honor, if I may?

16 I think you're absolutely correct on this one and the
17 proof is this. All of the proof they put in at trial of the
18 documentation, it was never anything hierarchical. It was
19 those things from the website that looked like a book, looked
20 like a dictionary; words on the left, definitions on the right.

21 There was no SSO to those when you put all the
22 comments together. It was just a bunch of English words in a
23 list. And the -- and any SSO claim --

24 **MR. JACOBS:** Your Honor --

25 **MR. BABER:** (Continuing) -- on the documentation

1 would add nothing whatsoever to the SSO claim on the code.
2 Because it's -- if I understand what Mr. Jacobs is saying, if
3 he's saying, well, there's SSO to the comments because they are
4 embedded in the code, that's the same issue we're asking the
5 jury for in number one, which is the overall SSO.

6 But if you are extracting all the documentation,
7 which I understand your definition, that's what you're doing,
8 you're pulling all the documentation out and putting it in sort
9 of a separate pot and saying we'll treat this as a literary
10 work, then there is no SSO to that.

11 **MR. JACOBS:** Your Honor, two things. First, they are
12 both literary works under copyright. Computer programs are in
13 the category literary work.

14 Secondly, I elicited the following testimony from
15 Mr. Lee.

16 **"QUESTION:** And the structure of the documentation is
17 identical; correct, sir? And if you think of it as a
18 outline, the outline would match identically;
19 correct, sir?

20 **"ANSWER:** Yes.

21 **"QUESTION:** And that's because on the Android side
22 you're documenting the same Application Programming
23 Interfaces as were documented on the Java side;
24 correct, sir?

25 **"ANSWER:** Yes."

1 There was other testimony from both Dr. Mitchell and
2 others about the hierarchical structure of the elements of the
3 Application Programming Interface in the documentation.

4 **MR. KWUN:** Your Honor, that's exactly -- the way
5 Mr. Jacobs just formulated the end is exactly what's going on,
6 whether the -- the documentation describes something that has
7 Structure, Sequence and Organization and it describes elements
8 that in the API have that Structure, Sequence and Organization.

9 And to allow them to argue this is part of their
10 documentation claim is -- raises all the problems about the
11 read before claim. Raises -- and is -- raises 102(b) problems.
12 The document itself does not have Structure, Sequence and
13 Organization.

14 Also, your Honor, it seemed to me that part of -- I
15 don't know if this was your goal, but part of what your
16 instructions do is separate out the SSO question and the
17 English language question. And by injecting SSO back into this
18 question it essentially, you know, muddies the two.

19 **THE COURT:** That's what I was going to say, is
20 that -- what if the -- see, I could imagine some scenarios
21 that, as follows.

22 One scenario would be this. The jury decides
23 that -- the jury decides that it was fair use to use the SSO.
24 Then the jury would then decide, well, based on that, it must
25 be fair use to use the manual. English words. They stand or

1 fall together. If that were to happen -- let me back up.

2 Take that scenario and compare it with this. I
3 actually think one scenario that could happen is that the jury
4 would decide that, yes, it was fair game to use the SSO, that
5 that was fair use, but that Google copied the text and that
6 is -- the text is infringing, but not the SSO. That's one
7 scenario.

8 A similar scenario could be that the judge says the
9 SSO is a method of operation and therefore 102(b) knocks it out
10 as a copyright. But even if that were to occur, you could
11 still have a -- the plain English words being so close that
12 they infringe.

13 So you are correct. My thought was to separate the
14 item that I thought was the SSO argument from the traditional
15 argument because even if it's fair use to use the same taxonomy
16 or outline, it's not necessarily fair use to plagiarize
17 somebody else's manual.

18 So I'm not saying you did plagiarize it. I'm just
19 saying a reasonable jury could come to that conclusion. That's
20 the way I was thinking about this. And for us to have -- put
21 the SSO back in, everything would then turn or fall on SSO.

22 **MR. KWUN:** And, also, your Honor if there were a
23 plaintiff verdict on the documentation and then on the reserved
24 issue, we concluded that the SSO was not copyrightable, we
25 wouldn't know the meaning of the documentation.

1 **THE COURT:** I'm going to leave it the way I have it.
2 Mr. Jacobs may convince other judges to the contrary, but it's
3 going to stay the way -- I think this way we will know what the
4 jury has decided and we will not know it without putting in
5 extra questions.

6 So it's going to say -- the SSO will not be part of
7 the plain English part.

8 **MR. KWUN:** Your Honor, we would have two edits to 21
9 for clarity, which is, "You have the copyrighted Java work,
10 which" --

11 **THE COURT:** Where is that? I'm getting tired here.
12 You have to help me.

13 **MR. KWUN:** Line 27.

14 **THE COURT:** Yes, okay.

15 **MR. KWUN:** We would request that you have "from
16 Version 1.4 or 5.0 of Java 2 Standard Edition." That the
17 "Java" term --

18 **THE COURT:** Can I say "registered copyrighted work"?

19 **MR. KWUN:** "The registered copyrighted work," that
20 would be fine too, your Honor.

21 **THE COURT:** All right then.

22 **MR. KWUN:** And then on Page 13, Line 2.

23 **THE COURT:** Wait. "Registered copyrighted work."
24 I'm just going to take out the word "Java," okay.

25 All right. Say where?

1 **MR. KWUN:** And Page 13, Line 2, where you say, "the
2 Java documentation." It's all Java documentation of something
3 related to Java.

4 So I would -- we would suggest that you either say
5 "the Oracle documentation," or "the Sun documentation," or "the
6 Java 2 Standard Edition documentation." So let me make clear
7 that this is not a reference to Java documentation generally.

8 **THE COURT:** I will just say, "denies that it's
9 documentation as a copy, period."

10 **MR. KWUN:** That's fine, your Honor.

11 **MR. BABER:** One last tweak, your Honor?

12 **THE COURT:** Yes.

13 **MR. BABER:** Line 1, it's also that, "There are
14 similarities in the language," and we don't want any confusion
15 with the Java programming language so maybe change "language"
16 to "wording." "There are some similarities in the wording."

17 **THE COURT:** Fine.

18 **MR. JACOBS:** I'm sorry, your Honor. I'm trying to
19 catch up to you.

20 **THE COURT:** That's a good change. It doesn't
21 prejudice anybody. It makes things clearer.

22 All right. Anything else on 21?

23 **MR. JACOBS:** What would it say instead of
24 "similarities in the language."

25 **MR. KWUN:** "In the wording."

1 **MR. JACOBS:** We have no concern with that, your
2 Honor.

3 **THE COURT:** 21.

4 (No response.)

5 **THE COURT:** 22.

6 **MR. KWUN:** No objections, your Honor.

7 **MR. JACOBS:** I just thought that just a minor word
8 suggests, your Honor.

9 "I will now describe an additional list of
10 specific items that Oracle contends" --

11 **THE COURT:** Wait a minute. Here I've got the law as
12 diminimus. All right. I do place the burden of diminimus on
13 Oracle, right?

14 **MR. KWUN:** Yes, your Honor.

15 **THE COURT:** All right. I'm going to leave that. I
16 still think this is a fair statement.

17 All right. 22? Anything more on 22?

18 **MR. JACOBS:** I'm sorry. Just let me -- on 22 -- I'm
19 missing the reference to the burden of proof, your Honor.

20 **THE COURT:** Where is that?

21 **MR. KWUN:** There isn't one.

22 **MR. BABER:** It's later.

23 **MR. JACOBS:** Okay. So on 22 all we were proposing is
24 to change "a shorter" in Line 10 to "an additional list."

25 **MR. BABER:** How about just "a list"? "I will now

1 describe a list of specific items."

2 **THE COURT:** Fine. "Shorter" comes out.

3 **MR. JACOBS:** That's a little confusing because in the
4 previous paragraph of the instructions is about documentation
5 where --

6 **MR. BABER:** There is no list.

7 **THE COURT:** I'm just going to say "list."

8 All right. 23.

9 (No response.)

10 **THE COURT:** 24. Ownership. This is where you were
11 going to be good lawyers and come up with the right answer.

12 **MR. JACOBS:** I have asked Google's counsel where they
13 are on ownership in light of this morning's proceedings. I
14 think Google is still considering where they are on ownership
15 in light of this morning's proceedings.

16 **MR. BABER:** I don't know, your Honor, that there is
17 any ownership issue for the jury. And I wonder if you can just
18 say something like:

19 "Now we will turn to the more detailed law."

20 Something like:

21 "The only issue for you to decide with respect to
22 infringement" --

23 What I'm trying to distinguish is there is, I don't
24 think, a fact question about ownership. There may be some
25 legal questions that you have to address later based on the

1 evidence that was adduced this morning, but the issue of what
2 that covers as a matter of law, I don't think there is any jury
3 issue and it would be hopelessly complicated to try and explain
4 it to the jury.

5 So I don't see a jury issue --

6 **THE COURT:** Look, you may be right that there is some
7 issue for me. And don't treat this transcript as me agreeing
8 that there is. I don't know. I'm not saying "yes" or "no" to
9 that.

10 But if I hear you right, then we don't need
11 Paragraph 24. We can just go with No. 23.

12 **MR. BABER:** That's correct, your Honor.

13 And I actually don't know if we need 23 either, to
14 tell you the truth. Since -- since there is no issue of
15 originality and there is no issue of ownership, all the jury
16 really needs to decide is substantial similarity.

17 **THE COURT:** Well, why don't I say that Oracle's work
18 is original and the owner -- and owner. And then say:

19 "These, for your purposes the parties agree that
20 these points have been proven."

21 How is that?

22 **MR. BABER:** I strongly prefer, for the same reasons
23 we briefed, the "assume" articulation. You know, "You may
24 assume that these have been established for purposes of your
25 deliberations," or "They are not disputed," or something.

1 **THE COURT:** I will say "established, but not proven."

2 **MR. BABER:** Okay.

3 **THE COURT:** But just between us and for all other
4 purposes it will be recognized, out of the presence of the
5 jury, that you may have some legal issue that you want to raise
6 later and I will consider that, but I don't recognize what it
7 is. I'm not saying you're wrong. That would be for another
8 day.

9 **MR. BABER:** And do we want to be clear, your Honor,
10 and say to the jury, you know, what you just wrote, that, you
11 know, you may consider this.

12 "There are no issues of originality or ownership
13 for you, the jury, to decide."

14 **MR. JACOBS:** I prefer that formulation, your Honor.

15 **THE COURT:** Say it. All right. "The parties agree
16 that" --

17 **MR. BABER:** "...there are no issues of ownership or
18 originality for you, the jury, to decide."

19 **THE COURT:** Okay.

20 **MR. BABER:** And then the last thing you need to do,
21 your Honor, just so it's complete, is Paragraph 23. And it
22 will make the transition good. 23 will say:

23 "Now I will turn to the more detailed law. In
24 order to prove infringement, Oracle must prove by a
25 preponderance of the evidence that Oracle's work is

1 original, that it is the owner of the part of the
2 work allegedly copied, and that Google has infringed
3 Oracle's copyright."

4 **THE COURT:** Well, I see your point. I've got a
5 better way to do it. I'm going to say that they must prove
6 that it is the owner original, blah blah blah, allegedly copied
7 and then say that the parties agree these are not issues for,
8 for you to decide.

9 Then I'm going to say -- where 25 is, I will delete
10 "to prove infringement." I will say, "Oracle must also prove
11 that Google copied."

12 How is that?

13 **MR. BABER:** In the transition, that's fine. The
14 substance is not fine of the rest of the sentence.

15 **THE COURT:** What sentence?

16 **MR. BABER:** Well, the sentence says, to prove
17 infringement they just need to show copying all our protected
18 part. Your Honor, that is not an infringement test.

19 **THE COURT:** I see your point. All right. How about
20 "must first prove"?

21 **MR. BABER:** "Must first prove ownership,
22 originality."

23 **THE COURT:** Say, "In order to prove infringement
24 Oracle must first prove by," blah blah blah. And then say,
25 "These point are not for you. The parties agree." Then go on

1 to say, "and Oracle must also prove."

2 All right?

3 **MR. BABER:** That will work, your Honor, as long as we
4 get the rest of the paragraph right.

5 **THE COURT:** All right. Well, I think we will. I
6 think the intent -- I understand the intent.

7 Okay. All right. Anything on 25?

8 **MR. BABER:** Yes, your Honor. Yes, your Honor.

9 **THE COURT:** What's that.

10 **MR. BABER:** Paragraph 25 as written basically equates
11 "copying" with "infringement." And we briefed a couple of
12 times the law, you know, from the Supreme Court on down, not
13 all copying is infringement.

14 So we think this whole question should be recast in
15 terms of Oracle must also prove that Google infringed the --
16 its copyrights. You don't infringe a part. They have to prove
17 that we infringed their copyright rights.

18 And there are two ways to prove infringement. One is
19 by proof of direct copying. The other is to show -- I'm sorry.
20 I take it back. I don't have this prewritten, and Mr. Kwun may
21 have to help me, but the notion is that the test of
22 infringement is substantial similarity, not whether there's any
23 copying at all. And that's where this, I think, sort of gets
24 off track.

25 **THE COURT:** The law is -- the Ninth Circuit itself

1 has said that you don't even need to get into substantial
2 similarity if there is direct copy.

3 **MR. BABER:** Your Honor, I think in the cases we cited
4 last week, the Ninth Circuit, like all the others, said that
5 you've got to show substantial similarity.

6 The diminimus cases all say --

7 **THE COURT:** It's identical.

8 **MR. BABER:** It is. It's identical copying. And
9 that's -- but it still has to result in a finding that there is
10 enough that the two works, whatever you define to be works as a
11 whole at the end of the day, there has to be enough similarity
12 to support a finding of infringement, which is substantial
13 similarity comparing A to B, whatever you choose A and B to be,
14 but they end of the day what has to be proven is substantial
15 similarity between the two of them.

16 **MR. JACOBS:** We disagree that that's the right way to
17 think about this. Where there is copying and there is no claim
18 that the copying is excused or of unprotectable elements, then
19 you're done.

20 If the claim is that the copying is excused, then you
21 show the excuse.

22 If the claim is that you didn't copy protectable
23 elements, the claim is that you didn't misappropriate protected
24 expression. So there's copying and misappropriation of
25 protected expression is the right way to think about it in this

1 context.

2 And in that context, I don't think you really need to
3 get the jury involved in this misappropriation of protected
4 expression issue because we have an admission of copying and
5 you're deciding what's protected and what's not. So the
6 substantial similarity test is in a different -- is a component
7 of access in substantial similarity, which is part of proving
8 copying; but as your question indicated, there is no question
9 of copying here. So there is no question of substantial
10 similarity.

11 **THE COURT:** On the documentation there's a question.

12 **MR. JACOBS:** That -- I'm sorry. I was distinguishing
13 the -- the -- you're right. Another way -- but you could say
14 it the same way. There is actually no question of copying the
15 documentation so much of it is identical.

16 What there is a question of whether the protected
17 expression in the English language text, now that you've teed
18 it up that way, was misappropriated and you would use -- given
19 the way you're teeing it up -- the virtual identity test for
20 that.

21 **THE COURT:** I like the way I've got it. "Oracle must
22 prove Google copied." So I'm going to leave that as it is.
23 Your point is preserved for appeal.

24 All right.

25 **MR. KWUN:** Two typographical errors, your Honor.

1 **THE COURT:** Yes.

2 **MR. KWUN:** On Page 14, Line 5, between "copyrighted
3 work" there should be the word "the."

4 **THE COURT:** Yes.

5 **MR. KWUN:** And on Line 10, same page, end of the
6 line, it should be "such comparisons," plural.

7 **THE COURT:** I'm sorry. I didn't catch the second
8 one.

9 **MR. KWUN:** Line 10 on the same page, the last word
10 should be plural.

11 **THE COURT:** Okay.

12 **MR. JACOBS:** So just to be clear, your Honor, we
13 object to the this instruction 25 on the basis of the virtual
14 identity test.

15 And I -- we're also concerned that "though use of
16 literary work" at Line 8 is going to be confusing to the jury,
17 the Court is telling the jury its substantial similarity tests
18 and to start comparing it to a work of literature, which, I
19 think, is what they'll think of. When they read "literary
20 work," will confuse them.

21 **THE COURT:** Look, I'm trying to explain to them why
22 we even have a tighter test and a looser test. And the concept
23 is that when you're talking about a narrow technical subject,
24 you don't have much latitude. You've got to use certain words.
25 But if this was Moby Dick, you would have more words to use.

1 **MR. JACOBS:** Maybe just suggest -- I would suggest
2 take out "literary." "This is in contrast to a work in which
3 there will be a broad range of creativity."

4 **THE COURT:** How about this? Take out "literary" and
5 put in "fictional work."

6 **MR. JACOBS:** I think what's problematic here is we
7 have a lot of testimony from both sides on how much creativity
8 is involved in expressing an Application Programming Interface
9 including it's Structure, Sequence and Organization.

10 **THE COURT:** But that's why on SSO you get the benefit
11 of substantial similarity. But when we're talking about just
12 the operating manual, in my mind when you're trying to explain
13 how the cosign method works, there are probably only 50 words
14 in the whole English language that would come to mind to
15 describe that. Less. 12 words. So to my mind these operating
16 manuals are highly cabined by the narrow subject matter.

17 The creativity -- I agree with you. The creativity
18 is in that, in the broad outline to begin with. But that's the
19 SSO part. And you're getting the benefit of the broader test
20 on that. Right?

21 **MR. JACOBS:** I'm just concerned with "literary" or
22 "fictional," that the jury will start -- will focus less on the
23 specific instructions here and start thinking about other areas
24 of copyright law.

25 **THE COURT:** Well, I don't think so.

1 All right. Anything else on this one?

2 **MR. JACOBS:** The -- especially I think now on the
3 documentation, we probably need more of an instruction on what
4 "access" means. "Access" is an opportunity to view, and I
5 don't think we have explained "access."

6 **THE COURT:** I don't think it needs to be explained.
7 Isn't there proof in the record that they had the -- they had
8 the operating manual right there in the clean room?

9 **MR. JACOBS:** Yes, your Honor.

10 **THE COURT:** That's access. I don't think we have to
11 explain that word.

12 All right. 25 I've made a few minor changes, but it
13 basically stays the same.

14 And now we have the follow-on one on objective
15 subjective. The ideal answer that I would like to hear is you
16 both agreed we don't even need to get into it.

17 **MR. JACOBS:** Your Honor, we would agree with that,
18 your Honor.

19 **MR. KWUN:** Your Honor we would request a short
20 statement. It doesn't actually have to go into a lengthy
21 explanation of the extrinsic and intrinsic test.

22 **THE COURT:** All right. Let me hear it.

23 **MR. KWUN:** It's three sentences:

24 "To determine whether the copyrighted work and
25 the accused work are substantially similar, or if

1 appropriate virtually identical, you must compare the
2 works as a whole."

3 Second sentence, and perhaps a new paragraph.

4 "However, in comparing the works as a whole, you
5 cannot consider similarity to unprotectable elements
6 of Oracle's works."

7 And then if you want to give them a bit of a guidance
8 on where that is mentioned in the instructions, you could have
9 this third sentence.

10 "I have instructed you about the protectable and
11 unprotectable elements of Oracle's works in
12 instructions 17, 19 and 20."

13 **THE COURT:** Let me see that.

14 (Whereupon, document was tendered
15 to the Court.)

16 **MR. KWUN:** It's scribbled.

17 **THE COURT:** Do you have any heartburn over there,
18 Mr. Jacobs? The only thing I would change -- if this is
19 okay -- is I don't like to call out other instruction numbers
20 because as they change --

21 **MR. KWUN:** Yes, your Honor. We could either leave
22 out the third sentence or say, "I have previously instructed
23 you on."

24 **THE COURT:** How does that sound, Mr. Jacobs?

25 **MR. JACOBS:** I think that's confusing and unhelpful,

1 your Honor. I think if -- the previous instruction makes it
2 clear that they are supposed to -- what test they are supposed
3 to apply and what the expression as to Structure, Sequence and
4 Organization for the program is.

5 So to now tell them, "Oh, whatever I just told you,
6 do something else is," is -- it's confusing and unnecessary,
7 really very separate from are the extrinsic/intrinsic or
8 objective/subjective question and not directed at meeting the
9 decisions that recite that standard.

10 **MR. KWUN:** Your Honor, the previous instruction
11 explains for which classes you should use "virtual identity"
12 and for which you should use "substantial similarity," but it
13 doesn't tell the jury what they are supposed to do with those
14 tests, and that was our aim with this instruction, instruction
15 26. And it's drawn from *Apple v Microsoft*.

16 **THE COURT:** All right. I like this. I think it's --
17 I want to cover the *Apple*. I think the Court of Appeals would
18 be possibly upset if I didn't cover the *Apple* point, and this
19 does cover it. And it's very short and straight to the point
20 and I think it's a correct statement.

21 **MR. JACOBS:** We object, your Honor.

22 **THE COURT:** All right. Your objection is noted.
23 This will go as Paragraph 26.

24 **MR. BABER:** Your Honor, I just noticed two typos back
25 in 25, if you want to catch them.

1 In Line 5 towards the end "virtual identity between
2 the copyrighted work."

3 **MR. KWUN:** Got that.

4 **MR. BABER:** The end of Line 10 --

5 **MR. KWUN:** Got that one, too.

6 **MR. BABER:** I was asleep, your Honor. I apologize.

7 **THE COURT:** Mr. Baber, what planet have you been on
8 the last...

9 (Laughter.)

10 **THE COURT:** Okay. All right. Now we're up to 27.

11 **MR. JACOBS:** Just a typo, your Honor. We propose to
12 delete in the second sentence at Line 19 "a" to just start with
13 "copying."

14 **THE COURT:** Got it.

15 **MR. JACOBS:** And this is, I think, different from the
16 verdict form, so I just wanted to be sure this was the Court's
17 intention.

18 "The burden is on Oracle to prove that the
19 copied material" --

20 **THE COURT:** Well, I have been going back and forth on
21 that in my own mind. And my law clerk tells me that the best
22 view of the law is that, while, it's not 100 percent clear, is
23 that the burden is on the plaintiff.

24 **MR. JACOBS:** So we object, your Honor.

25 **THE COURT:** All right. That's fine. I don't blame

1 you. And it's not a hundred percent clear. It's just our best
2 view of what the Ninth Circuit law is.

3 Okay. 28.

4 **MR. KWUN:** Your Honor, one other thing. Just that
5 the language on not actionable, I think that actually does
6 appear in the cases, but I think it would be more jury friendly
7 to say "not infringing." They are not going to necessarily be
8 familiar with the term "actionable."

9 **MR. JACOBS:** No objection, your Honor.

10 **THE COURT:** All right. That's a good change.

11 All right. What else?

12 **MR. JACOBS:** That brings us to fair use, and both of
13 us briefed the fair use instruction.

14 **THE COURT:** My law clerk will now hand out -- let's
15 go ahead and hand out --

16 **LAW CLERK:** I didn't realize you wanted me to have
17 that.

18 **THE COURT:** Do you have your copy?

19 **LAW CLERK:** No, I do not. Do you want me to get a
20 copy?

21 **THE COURT:** Run get a couple of copies of that thing
22 that we worked up.

23 **LAW CLERK:** Okay.

24 **THE COURT:** I basically took all of your changes that
25 you wanted. I think I have 90 percent of what each of you want

1 in and, therefore, you should both be 90 percent happy.

2 **MR. KWUN:** As long as it's the right 90 percent, your
3 Honor.

4 **THE COURT:** And you'll see it in just a moment.

5 **MR. KWUN:** Your Honor, while we're waiting, do you
6 want to move on to 29? We have a short simple point on 29.

7 **THE COURT:** All right. Let's go to 29.

8 **MR. KWUN:** On 29, "Google admits that the accused"
9 line. We would request and change it to "does not contest."
10 Dr. Bloch, when he testified, for example, said he
11 didn't remember whether or not he had copies of these, but he
12 was willing to believe that he did.

13 **THE COURT:** I will change it to "agrees," to
14 "agrees." But I think you have admitted that. And the
15 witnesses did. And you're going to admit it. I think you even
16 admitted it in your opening. So I'm going to say "agrees."

17 All right?

18 **MR. JACOBS:** Yes, your Honor.

19 **MR. BABER:** I think that's all right.

20 **MR. KWUN:** Yes, your Honor.

21 **THE COURT:** All right. How about the -- okay.
22 My law clerk is going to hand out a revised 28.
23 (Whereupon document was tendered
24 to counsel.)

25 **MR. JACOBS:** Can we have a moment, your Honor?

1 **THE COURT:** Yes, sure.

2 Do we have the bolded stuff in there.

3 **LAW CLERK:** No, I didn't give them the bolded --

4 **THE COURT:** My copy had some bolding in there. If
5 you take a moment.

6 (Brief pause.)

7 **THE COURT:** Okay. I've given you four or five
8 minutes. Comments?

9 **MR. KWUN:** Your Honor, consistent with one of your
10 earlier instructions, we would suggest that the "public" in the
11 second sentence be changed to "anyone."

12 **THE COURT:** All right.

13 **MR. KWUN:** And a couple typos. In the first
14 paragraph, last sentence, it should be "commercial use cuts
15 against fair use."

16 **THE COURT:** Yes.

17 **MR. KWUN:** And the second factor at the end of the
18 first line should be "whether the work is creative."

19 **THE COURT:** Where?

20 **MR. BABER:** Second factor, your Honor.

21 **MR. KWUN:** End of first line of the second factor,
22 "the work is."

23 **THE COURT:** "Whether the work is creative"?

24 **MR. KWUN:** Yes.

25 **THE COURT:** All right. I see that point. That's all

1 your complaints.

2 **MR. KWUN:** It was the right 90 percent, your Honor.

3 **THE COURT:** Okay. How about the plaintiff?

4 **MR. JACOBS:** So, your Honor, we're going to be moving
5 for judgment on this claim. Under the decisional law, it's
6 quite apparent to us that notwithstanding the law -- the mixed
7 law, the fact, nature of fair use, Google's use is not fair.

8 With that in mind, the elements of this instruction
9 that are particularly problematic from the standpoint of
10 declaring the law for the jury is whether the work is
11 transformative. Under the law there is no possible way what
12 Google did -- that is, taking someone else's code and putting
13 it into free code for use on platforms -- could be considered
14 transformative.

15 So including "transformative" in these instructions
16 is -- we object to.

17 "Commercial does cut against fair use while
18 transformative use supports fair use."

19 Again, is the same -- is the same point. We object
20 to that sentence.

21 We also object to "functional" being included in two.
22 There are cases that, I think, are what the Court had in mind
23 when referring to "functional," but this case is not those.
24 And the functional use cases talk about a very narrow
25 situation. That is not the situation here.

1 So the inclusion of "functional" on two we believe is
2 contrary to law in view of the undisputed facts here.

3 And then No. 5:

4 "You may consider additional factors you believe
5 are appropriate."

6 We think gives the jury too much freedom to decide
7 what is a -- what is the, quote, right, unquote, thing to do
8 here in their view. And, in fact, looking at the decisional
9 law on fair use, the range of discretion for the factor finder
10 is quite narrow. Many, many cases hold the fair use question
11 as a matter of law.

12 **THE COURT:** Are you saying it's never a jury
13 question?

14 **MR. JACOBS:** No. It's not never. But when the facts
15 are as the facts are here, it is not an unbounded decision.
16 And, in fact, the cases on fair use repeatedly recite that
17 while the statute has this certain quality to it, discretion is
18 quite limited. And case after case holds against a defendant
19 arguing fair use. The Ninth Circuit itself is quite rigorous
20 in patrolling fair use claims. So, we object to No. 5.

21 "And then it is up to you to decide how much weight,"
22 similarly is contrary to law. The Supreme Court has said that
23 if you're commercial, then there's a presumption that you're
24 going to have an effect on the potential market for a value of
25 the work. Some factors are more equal than others. So I

1 understand what the Court was trying to do here. I do need to
2 note our objections on these points.

3 **THE COURT:** Isn't there --

4 **MR. JACOBS:** Sorry, one more.

5 **THE COURT:** Isn't there law on No. 5? Isn't there
6 law that says this is not an exhaustive list?

7 **MR. KWUN:** Your Honor, it's right in the statute.
8 It's certainly in cases as well, but it's right in the statute.

9 **MR. JACOBS:** The statute also starts off, though,
10 your Honor, with the kinds of uses that fair use is typically
11 found in. And so it's in that context, with that predicate
12 that that statement is made.

13 **MR. KWUN:** Your Honor, the list of types of fair uses
14 in the statute is not intended to say that these are the only
15 types of things that are fair use. It's merely examples. And
16 the cases find fair use, for example, for copying the entirety
17 of the computer work in order to reverse engineer the
18 functional elements in a -- say, to the accolade and *Sony v*
19 *Connectix* pretty clearly shows that the fair use cannot be
20 cabined to the -- the examples listed in the statute.

21 **THE COURT:** Where does the statute say other factors?

22 **MR. BABER:** It's right above the numbered one your,
23 Honor. It says:

24 "In determining whether the use made of a work in
25 any particular case is a fair use, the factors to be

1 considered shall include."

2 **THE COURT:** So you're putting a lot of weight on the
3 word "include."

4 **MR. BABER:** Yes, your Honor. And the courts have
5 said it's not an exhaustive list. It is not intended to limit
6 the inquiry to just the four factors.

7 **MR. JACOBS:** Your Honor, *Harper and Row* says:

8 "Fair use when properly applied is limited to
9 copying by others which does not materially impair
10 the marketability of the work which is copied."

11 Sony says -- these are Supreme Court decisions:

12 "A challenge to a non-commercial use of a
13 copyrighted work requires proof either that the
14 particular use is harmful or that, if it should
15 become widespread, it would adversely affect the
16 potential market for the copyrighted work. If the
17 intended use is for commercial gain, that likelihood
18 [of market harm] bracket may be presumed."

19 That's Sony Corp. --

20 **THE COURT:** What was that first phrase you gave me
21 about *Harper*?

22 **MR. JACOBS:** *Harper* was:

23 "Fair use when properly applied as limited to
24 copying by others which does not materially impair
25 the marketability of the work which is copied."

1 That's 471 U.S. 539 at 566-67.

2 And then *Sony*, and later cases including *Napster* in
3 the Ninth Circuit, and *Leadsinger* in the Ninth Circuit.

4 So *Napster* 239 F.3d 1004, 1016 recites this
5 presumption that if it's a commercial --

6 "If the intended use is for a commercial gain,
7 the likelihood of market harm may be presumed."

8 And then *Leadsinger* says -- *Leadsinger* was an
9 interesting case. It was a karaoke case in which the music,
10 lyrics, were applied to a karaoke display system. That's 512
11 F.3d 522. *Leadsinger* at 532 said:

12 "We have not hesitated to apply this
13 presumption."

14 So it's not unbounded. Particularly where we have a
15 commercial use and particularly where the -- yeah, particularly
16 where there is a commercial use. Market impairment is presumed
17 and they then have to turn around and rebut it.

18 So they've got a very uphill battle here and these
19 instructions make it quite open ended.

20 **MR. BABER:** Your Honor, two points.

21 First on the just the issue of statutory use of
22 "including." 17 USC Section 101, which is the definition
23 section of the Copyright Act says:

24 "The terms 'including' and 'such as' are
25 illustrative and not limited."

1 And, your Honor, the presumption that Mr. Jacobs is
2 talking about if it's commercial, it should be presumed not to
3 be fair. The Supreme Court did away with that in *Campbell*
4 *versus Acuff-Rose*, 1994.

5 "If indeed commerciality had a presumptive force
6 against a finding of fairness, the presumption would
7 swallow nearly all of the illustrative uses listed in
8 the preamble paragraph of Section 107, including news
9 reporting, comment, criticism, teaching, scholarship
10 and research since these activities are generally
11 conducted for profit in this county.

12 "Congress could not have intended such a rule,
13 which certainly is not inferable from the common law
14 cases arising, as they did, from the world of letters
15 in which Samuel Johnson could pronounce that 'no man
16 but a block head ever wrote except for money.'"

17 "Sony itself called for no evidentiary part,
18 evidentiary presumption. There we have emphasize the
19 need for a sensitive balancing of interests noting
20 that Congress had eschewed a rigid bright line
21 approach to fair use."

22 **MR. JACOBS:** Your Honor, it is -- that is a correct
23 recitation of *Acuff-Rose*, which was a parity case; pretty
24 woman, a pretty woman parity case.

25 **THE COURT:** Yes, I remember the case.

1 **MR. JACOBS:** But the Ninth Circuit has reaffirmed the
2 viability of the presumption. The *Leadsinger* case that I
3 mentioned -- or *Leadsinger*, I guess -- is a 2008 case. It's
4 actually granting a motion to dismiss. And it cites the *Matel*
5 case, which cites *Harper and Row Publishers*.

6 So, and in the Ninth Circuit the law on the
7 presumption is, as I read from the -- as I read the
8 presumption, is alive and well.

9 **THE COURT:** All right. I will think about your
10 objections. I'm not going to give you a ruling right now.
11 You'll just have to wait and open the envelope when it comes.

12 **MR. JACOBS:** Thank you, your Honor. Thank you for
13 listening.

14 **THE COURT:** All right. So that's 28.
15 How about 29?

16 **MR. JACOBS:** Give me a minute, your Honor, to get
17 reorganized here.

18 **THE COURT:** We have already done 29.
19 30.

20 **MR. JACOBS:** So now in 30 that we have receded from
21 our package-by-package determination, we can simplify from
22 Lines 15 to 21 and delete -- yes, delete "for purposes of the
23 first two subquestions," all the way down in line --

24 **THE COURT:** 20.

25 **MR. JACOBS:** (Continuing) -- 20 "for that individual

1 API package."

2 So just to be clear, we'll be doing, "The test for
3 infringement on both the documentation and the code for the 37
4 packages," and not package-by-package even as to the
5 documentation. That was the topic I had noted this morning.

6 **MR. BABER:** But then don't we have to say, "For
7 purposes of questions numbers one and two?" Because one is the
8 SSO and two is the documentation.

9 **THE COURT:** So it will be a parallel. Parallel
10 number two.

11 **MR. JACOBS:** Yes. Mr. Baber is correct.

12 **THE COURT:** I will just make a note to do that. All
13 right.

14 **MR. BABER:** And, your Honor, just so the jury knows
15 what they are supposed to be comparing, can we say it has to be
16 compared with all of the 166 API packages, not just the 37?

17 **THE COURT:** No. Too argumentative.

18 **MR. BABER:** Okay. And, your Honor, we do continue to
19 object to the work as a whole being something less than the
20 entire registered work.

21 What I'm concerned about especially, however, is your
22 Honor telling the jury that work as a whole means different
23 things for different bases of their infringement claim. They
24 are making a claim that we infringed their copyright. There is
25 one copyright. They have advanced several theories as to how

1 we infringed that copyright, but now you're telling the jury,
2 Well, based on which part of their infringement theory you're
3 looking at, it's infringement of a different work.

4 So I think we're fine with 166 API packages, all
5 their Java packages, but we think that same work as a whole --
6 make it easier for the jury. They will have one work as a
7 whole that applies across the board. We think once you have
8 decided to carve out a smaller work from the whole work, that
9 should apply.

10 **THE COURT:** We all agree -- are you complaining now
11 about the 12 code files? Is that what you're getting at?

12 **MR. BABER:** That would be question three, your Honor,
13 yes.

14 **THE COURT:** Why don't you both just stipulate? Come
15 on. You could make it simpler for the jury. We'll take the
16 166 packages as -- in their entirety as the work as a whole.

17 **MR. JACOBS:** The code files --

18 **THE COURT:** For all purposes the comparative
19 benchmark will be work as a whole equals 166.

20 **MR. BABER:** I think that works, your Honor.

21 **MR. JACOBS:** We endorse the decision you made so far
22 in part because those files aren't necessarily in the 166.

23 **THE COURT:** I thought they were.

24 **MR. JACOBS:** Only rangeCheck, your Honor.

25 **THE COURT:** That's in the 37. I'm talking about the

1 166.

2 **MR. JACOBS:** I don't believe they are in the --

3 **MR. KWUN:** Your Honor, the issue is that the test
4 files aren't part of an implementation of any package.

5 **MR. BABER:** No, no. But it's where they are in Java
6 that counts, not where they are in Android. In Java they are
7 in a securities slash something -- I don't know.

8 **MR. KWUN:** Two of the files are not in the 166 in
9 Java. Two of the files -- the file from which comments appear
10 are in a -- well, they are in a different namespace. They are
11 not in the Java namespace. They are in the Sun.something
12 namespace.

13 **MR. PETERS:** Excuse me. I think it's backwards. The
14 A files that were copied were in the Sun namespace. The files
15 that --

16 (Court reporter interruption.)

17 **THE COURT:** The court reporter just can't hear you.
18 Say your name, and repeat that.

19 **MR. PETERS:** I apologize to everyone. My name is
20 Mark Peters.

21 I just wanted to comment that the eight decompiled
22 files were decompiled in the Sun product. They were in the Sun
23 namespace rather than the Java namespace, so they are not part
24 of the 166 API packages.

25 The two files from which comments were taken were

1 taken or copied from files in the Java namespace in the Sun
2 product, but were not in the Java namespace in Android.

3 **THE COURT:** I'm going to leave it just as I had it
4 "in the same file."

5 **MR. BABER:** Okay.

6 **THE COURT:** Because I didn't realize. I thought they
7 were at least within the 166.

8 **MR. BABER:** I forgot that as well, your Honor.

9 **THE COURT:** Huh?

10 **MR. BABER:** I said, I had forgotten that as well.

11 **THE COURT:** All right. So, number one and two will
12 be the 166, "all the API packages." But number three is the
13 same.

14 **MR. KWUN:** Your Honor, just for the record, we do
15 object to that formulation and we continue to -- our objection
16 is to anything less than J2SE as a whole.

17 **THE COURT:** That point is preserved for appeal.

18 All right No. 31.

19 **MR. KWUN:** Your Honor, I believe that 31 is a license
20 instruction, instruction of a license defense. We -- although
21 we asserted a license defense in our answer, in the final
22 pretrial order we omitted -- we intentionally omitted the
23 license defense. I think that 31 can be deleted.

24 **MR. JACOBS:** Actually, your Honor, I think that 31 is
25 important. We would propose that it be made a little more

1 specific to the facts of the case, and that reference be made
2 to Apache Harmony --

3 **THE COURT:** I'm not going to do that. That's arguing
4 your case for you.

5 But that is one of the reasons I have this in here,
6 is of the danger that the jury will not understand how
7 licensing works and they will somehow think that there has been
8 a license via Apache.

9 But I don't want to call out Apache by name. You'll
10 have to argue that point.

11 **MR. JACOBS:** Is there a way to take advantage,
12 though, of Google's concession that there is no license defense
13 here and inform the jury of that, rather than leave it as the
14 burden is on Google to prove that it had any such license or
15 sublicense rights?

16 **THE COURT:** Well, how about this as a compromise? We
17 take 31 out all together and say:

18 "Google makes no claim that it acquired any
19 license from anybody to use any of the copyrighted
20 works."

21 **MR. KWUN:** Your Honor, I think that that's probably
22 an incorrect statement because we do contend that we have a
23 license from Apache. So we do have a license to the
24 copyright -- well, to the works, to the code that we use --

25 **THE COURT:** That's a license defense.

1 **MR. KWUN:** No, but we don't intend that that's a
2 defense in this case. It's just not true that we don't have a
3 license.

4 **MR. BABER:** Your Honor, we have a -- we have a
5 license under the Harmony license, but the reason why we could
6 use the SSO is because that's unprotectable. We don't need a
7 license to the SSO.

8 **THE COURT:** Well, I'm saying to the jury that you do.

9 **MR. BABER:** I understand.

10 **THE COURT:** So for purposes of what the jury has got
11 to decide --

12 **MR. BABER:** If you tell the jury we agree we don't
13 have a license and you tell them the SSO is copyrightable, then
14 they have to find infringement in effect.

15 **THE COURT:** They can find --

16 **MR. KWUN:** The bigger problem, your Honor, is we
17 offered testimony that we do have a license and if you say that
18 we now say that we don't have a license, then it sounds like
19 we --

20 **THE COURT:** You can say:

21 "Google agrees it does not have any license which
22 covers the copyrighted work."

23 How is that?

24 **MR. KWUN:** But if --

25 **MR. BABER:** Licensed from Sun.

1 **MR. KWUN:** What if we said we agree that we do not
2 have an express license from Sun. We do have an implied
3 license defense.

4 **THE COURT:** No. I thought you said you gave up all
5 your license defenses.

6 **MR. KWUN:** We -- we don't have a license defense,
7 which is -- we do have an implied license defense, which is an
8 equitable defense.

9 **THE COURT:** Well, that's for the judge.

10 **MR. KWUN:** Right.

11 **THE COURT:** But for purposes of the jury, why don't
12 you say:

13 "Google agrees that it has no license that would
14 allow it to use any of the copyrighted works."

15 **MR. KWUN:** Well, your Honor, can we just remove the
16 license discussion here and instead have an instruction
17 saying -- I mean, I believe there was actually one that both
18 parties had that was pretty similar that -- I'm trying to
19 remember what it was in the original briefing, but that we
20 cannot be... Just a second your Honor. I will have to find
21 it.

22 **THE COURT:** No, I'm not going to do that. I want --
23 look. You have put a lot of evidence before the jury about
24 Apache Harmony and all these other people, and you're slowly
25 convincing me that I better put Apache Harmony in here by name.

1 I think that there is a risk that the jury is going
2 to think that you somehow had permission, because you had the
3 license from Harmony and you thought it was fine and didn't
4 know that you needed a license and all this stuff about nobody
5 ever complained to Apache Harmony and the committee and they
6 had a vote and there were dissenters. All that is before the
7 jury.

8 Now, I also note that that was, in part, for my
9 benefit so that I could make the decisions I've good to make on
10 the equitable defenses. So there is nothing wrong with what
11 you did. But because it was a joint trial, I want to protect
12 against a misimpression off-track reasoning, and the off-track
13 reasoning would be that you had some kind of permission and it
14 was okay to use it.

15 So I'm going to address this for sure one way or the
16 other, and I like my own way to address it. But if you're
17 willing to just agree that for -- for jury purposes you agree
18 that there is no license, Google had no license that would
19 permit it to use any copyrighted -- copyrighted works in
20 question.

21 **MR. KWUN:** Your Honor, I just think that the jury is
22 going to read into that more than it says. They are going to
23 read into that that you're directing a judgment of
24 infringement.

25 **THE COURT:** No, I'm not.

1 **MR. KWUN:** I understand that you're not, but I think
2 that they are going to look at that --

3 **THE COURT:** Then reword what I just said in a more
4 favorable way and maybe it will work.

5 **MR. KWUN:** Well, I mean, other than those few small
6 points, your Honor, which says if you don't have a license then
7 you -- then you don't have permission, and that's not true
8 because even without a license, there could be lack of
9 infringement. There could be diminimus infringement.

10 **THE COURT:** Of course.

11 **MR. KWUN:** There could be fair use.

12 **THE COURT:** I explained that. You don't even get to
13 this until I've explained all that.

14 **MR. JACOBS:** Your Honor, may I make a parole that
15 captures the language that's in 31 as best as I think we can?

16 If we start with:

17 "Google had no right to copy any elements of the
18 Java Platform protected by copyright unless it had a
19 written license to do so from Sun or Oracle or had a
20 written sublicense to do so from a third party, we
21 would propose, such as Apache, who had a license from
22 Sun or Oracle conferring the right to grant such
23 sublicenses. Google does not contend that it has any
24 such license rights."

25 **THE COURT:** Is that okay?

1 **MS. ANDERSON:** No.

2 **MR. KWUN:** Your Honor, it invites the jury to read
3 that as negating --

4 **THE COURT:** I'm going to leave it just the way I got
5 it. I'm not going to put the thing in about Apache, but I'm
6 just going to say the burden is on Google to prove it had any
7 such license or sublicenses rights.

8 **MR. KWUN:** Your Honor, can we add a clause in the
9 beginning that says:

10 "Unless Google proves fair use or some other
11 exception, some other exception to infringement."

12 Or even:

13 "Unless you find fair use for some other
14 exception to infringement."

15 **THE COURT:** I'm going to start it off by saying:

16 "Unless you find fair use or non-infringement,
17 Google had no right," et cetera, et cetera.

18 Okay?

19 **MR. JACOBS:** Your Honor, that --

20 **THE COURT:** Yes?

21 **MR. JACOBS:** Just -- I'm sorry. I didn't mean to
22 interrupt.

23 **THE COURT:** Anything more on 31?

24 **MR. JACOBS:** Yes. Similarly, if Google -- Lines 7
25 to 9.

1 "Similarly if Google contends that Oracle or Sun
2 had dedicated elements protected by copyright to the
3 public domain for free and open use, the burden is on
4 Google to prove such a public dedication."

5 There is a lot of law around public dedication, what
6 you would actually have to do to affirmatively lose your
7 copyright rights. I don't think that Google actually contends
8 that.

9 **THE COURT:** Well, all right. Can I just say, "and
10 Google makes no such contention."

11 **MR. BABER:** No, your Honor. We contend that the Java
12 programming language has been dedicated to the public and it's
13 free and open for everyone to use. And --

14 **THE COURT:** What elements do you have to prove for
15 that to happen?

16 **MR. BABER:** Well, I think we had the deeming motion.

17 **THE COURT:** No. But for purposes of the jury, not
18 for purposes of what I have to decide. Is there any jury issue
19 about public dedication?

20 **MR. BABER:** No, your Honor. Not that I'm aware of,
21 no.

22 **THE COURT:** All right. So then why don't I say, "The
23 burden would be" --

24 **MR. BABER:** Why don't we take the sentence out, your
25 Honor?

1 **THE COURT:** Why don't we say, "Then similarly" --

2 **MR. BABER:** I don't think we need it at all.

3 **THE COURT:** I don't want the jury to speculate about
4 it because they have heard about public domain.

5 **MR. KWUN:** Your Honor, if you want to include
6 something there, you could say:

7 "The burden would be on Google to prove such
8 public dedication. There is no jury issue of public
9 dedication."

10 **THE COURT:** I could say -- how did I phrase that
11 before? "But the parties agree there is no issue" -- "parties
12 agree that there is no such issue for you to decide."

13 How is that?

14 **MR. BABER:** That works, your Honor.

15 **THE COURT:** Okay.

16 **MR. JACOBS:** Your Honor, I'm worried that the
17 introductory language that was proposed for 31. We're getting
18 wheels within wheels here.

19 In general, you're not cross referencing back each
20 time. You're laying these out very crisply and it could be
21 quite confusing.

22 **THE COURT:** I'm -- no, no.

23 I'm going to 32 now. 32.

24 **MR. JACOBS:** Hang on just a minute.

25 **THE COURT:** Can I ask you all to just stipulate? Why

1 do you want to complicate the life of the jury with this? Why
2 don't you just stipulate between you that if the jury finds
3 liability, it has found liability on these vicarious theories?

4 **MR. KWUN:** Your Honor, we would actually suggest
5 something different, which is we don't see how vicarious or
6 contributory infringement, A, be proven without proving direct
7 infringement; and, B, what it adds to their case in that
8 circumstance if they have proven direct infringement.

9 So, we don't see that there is any reason to raise
10 the issue at all.

11 **MR. JACOBS:** The reason is a damages issue. If
12 Google would stipulate that we don't have to have a verdict of
13 liability for indirect infringement to make out the damages
14 claim that we have made, then I don't think -- then I think we
15 could probably live without this.

16 **MR. KWUN:** Your Honor, none of the experts have
17 addressed alternative damages theories depending on whether or
18 not there is indirect liability.

19 **MR. JACOBS:** Well --

20 **THE COURT:** Well, but the -- I don't know if you're
21 trying to split hairs over there. I think what Mr. Jacobs is
22 saying, let's say that a jury turns out to be very sympathetic
23 to Oracle and you get hit for \$6 billion, whatever the number
24 is. Then you come back and say, "Wait a minute. That includes
25 some other things that would only have been permissible if

1 there had been indirect infringement and they never got a
2 verdict on infringement." Mr. Jacobs wants to be protected
3 against you making that argument later.

4 So if you were to stipulate now, "We won't make that
5 argument later, we give that line of argument up now," then you
6 know we could leave this Paragraph 32 out.

7 **MR. KWUN:** Well, I mean, I'd like to just quickly
8 confer with my client.

9 **THE COURT:** Okay. Let me first -- is that acceptable
10 to the plaintiff? I don't want to speak for you. I'm just
11 imagining that you were.

12 **MR. JACOBS:** You understood, your Honor, yes. That
13 would be acceptable to us.

14 (Discussion held off the record
15 amongst defense counsel.)

16 **MR. KWUN:** Your Honor, if we can get a stipulation
17 that they are not arguing that there is any particular element
18 of damages that are based on the indirect liability theories.

19 I mean, we don't know what the -- what we're
20 stipulating to because we don't know what they are claiming are
21 the indirect liability damages. We don't see any incremental
22 damages that are due to indirect liability.

23 And, as I mentioned, I don't think -- actually, I'm
24 quite certain that none of the experts have stated any sort of
25 alternative calculations that depend on whether or not indirect

1 liability is proven. There is just a number of -- or a range
2 of numbers under various scenarios that all of the experts
3 said, all three of the copyright damages experts --

4 **THE COURT:** Well, would you then -- I mean, you know
5 what -- what the theories are, right? And is there anything in
6 any of those reports that you think is indirect infringement
7 and would argue later was impermissible because it was based on
8 indirect infringement?

9 **MR. KWUN:** There is nothing within the expert report.
10 Their expert report of Dr. Cockburn we would object to on that
11 basis.

12 I don't know whether they are planning on raising
13 some fact issue that is distinct from that or something like
14 that.

15 **MR. JACOBS:** How about Dr. Curl?

16 **MR. KWUN:** Same for Dr. Curl.

17 **MR. JACOBS:** Then I think we can -- our theories are
18 our theories as set forth in those reports. If Google is
19 saying they won't challenge those theories if there is -- on
20 the basis that there is no verdict of indirect infringement,
21 whether vicarious or contributory under Paragraphs 32 or 33 of
22 the proposed instruction, then I think we can accept the
23 removal the theories from the instructions.

24 **MR. NORTON:** I just want to make sure I understand.

25 **THE COURT:** Mr. Norton, how many people are going to

1 speak for Oracle?

2 **MR. NORTON:** Well, no more than speak for Google.

3 **MR. JACOBS:** Just a minute your Honor. Just a
4 minute.

5 (Discussion held off the record
6 amongst plaintiff's counsel.)

7 **THE COURT:** All right. I'm going to say it in my own
8 words. There was only two permissible answers. "Yes." "No."

9 **MR. JACOBS:** The Court is together to articulate
10 there for us.

11 **THE COURT:** You listen to what I have to say and you
12 can either say "yes" or "no," but you can't give conditions.

13 If Google withdraws its request for Paragraph 32 in
14 the corresponding verdict forms on indirect infringement --

15 **MR. KWUN:** If Oracle, you mean.

16 **THE COURT:** What did I say?

17 **MR. KWUN:** If Google.

18 **THE COURT:** Thank you.

19 If Oracle withdraws its request based upon 32 and
20 corresponding verdict form, then Oracle will not be prejudiced
21 in any way with respect to the damages theories that have been
22 articulated by the experts in this case on damages.

23 Both side agree to that?

24 **MR. KWUN:** Your Honor, I think we actually have to
25 confer with our client at greater length on that. I don't

1 think we can agree to that.

2 **THE COURT:** All right. Here is what --

3 **MR. JACOBS:** We would say yes.

4 **THE COURT:** All right. Here is what -- okay. Now,
5 you all think about this. Here you are with 90 minutes, 90
6 minutes between you and a \$6 billion verdict maybe. There's
7 more to go on this. And you want to use up 12 of those 90
8 minutes explaining why there is no indirect infringement when
9 it's absolutely clear that if you infringe, all those Motorola
10 units are infringing. And you want to preserve that issue and
11 use your time on that, okay. I salute you.

12 **MR. BABER:** We said we would think about it. We have
13 to talk to the client.

14 **THE COURT:** I believe you're some of the best lawyers
15 in America and if anybody can do all those things in 90
16 minutes, you can do it.

17 I suggest this. I'm going to leave it exactly as it
18 is. It's going to stay in there and it's going to go to the
19 jury unless I get some word pretty soon after this hearing that
20 you both agree to take it out.

21 **MS. ANDERSON:** Yes, your Honor. We will get back
22 promptly.

23 **THE COURT:** I recommend that you get back to me
24 promptly.

25 Same thing on Paragraph 33.

1 **MR. JACOBS:** Yes, your Honor. We understood they
2 went together.

3 **THE COURT:** Is there anything else all the way to the
4 bitter end that you care about?

5 **MR. JACOBS:** On 33, your Honor, just -- and 32.

6 33 contends that "Google" -- at the bottom there on
7 Line 28 -- "should be found liable for contributory liability."

8 And then on the next page Line 9, "Google knew or had
9 reason to know."

10 **THE COURT:** Yes.

11 **MR. JACOBS:** And if I could just have a may not.

12 (Discussion held off the record
13 amongst plaintiff's counsel.)

14 **MR. JACOBS:** That's it on those, your Honor.

15 **THE COURT:** All right.

16 **MR. JACOBS:** And then we had nothing.

17 **THE COURT:** 34 to the end, anybody got any --

18 **MR. KWUN:** Your Honor, just back on 32 and 33. Two
19 items that apply to both of them.

20 **THE COURT:** Sure.

21 **MR. KWUN:** First of all, the formatting of this,
22 there are three things that actually they would need to find in
23 order to find contributory liability or vicarious, and those
24 three things are the two indented paragraphs, plus the fact of
25 third party infringement.

1 So the way it's -- I know that it says they have to
2 find third-party infringement, but the way it's formatted lends
3 a jury to believe there's actually only two things they need to
4 find.

5 So that's issue number one. We would suggest having
6 all three items listed in indented tabs.

7 **THE COURT:** All right. Fine. I can put that in.
8 What else?

9 **MR. KWUN:** Pardon me?

10 **THE COURT:** It's a little redundant, but I see your
11 point.

12 **MR. KWUN:** And then the other issue is, you can say
13 that your verdict should be for Oracle, and we would request
14 could say that "in your answer on question" whatever it is --

15 **THE COURT:** No, no. That's all right. I'm not going
16 to make that change.

17 All right. That's all. Anyone have anything more
18 all the way to the end?

19 **MR. BABER:** Typo, your Honor, on Line 14 I think.
20 "You may consider the Oracle's claim." Take out "the," "the
21 Oracle."

22 **THE COURT:** Thank you for that.

23 Anything more? On the instructions?

24 (No response.)

25 **MR. JACOBS:** Your Honor, just --

1 **THE COURT:** Let's go to the verdict form.

2 **MR. JACOBS:** Your Honor, I think you had the
3 placeholder for instructions that are not in the instruction.

4 **THE COURT:** Yes, that's right. I forgot.

5 **MR. JACOBS:** We briefed this, your Honor, and I just
6 want to make sure it's preserved; that's the derivative works
7 issue. We believe there should be an instruction on the
8 creation of a derivative work in the code from the
9 documentation.

10 **THE COURT:** All right. You briefed this on your Rule
11 50, correct?

12 **MR. KWUN:** Yes, your Honor.

13 **THE COURT:** Here. I will say it as clearly as I can
14 late in the day, and that is this: If someone were to get --
15 give you an assignment, give anybody an assignment and say, go
16 write a book, a guide on how to drive from San Francisco to
17 Monterey, California and, you know, everybody could sit down
18 and write their own two page thing on that. There would be
19 some similarities, but the idea is not protected. It is the
20 classic difference between the idea and the expression.
21 Everyone in this room would write it a little bit differently.
22 And every single one of those versions would be entitled to
23 their own copyright. It would not be a copy of somebody else's
24 work.

25 So to my mind when the -- when somebody looks at an

1 idea of a specification saying this input and these two
2 outputs, and this is -- this will be the declaration, but
3 you've got to have all this code underneath there, sometimes
4 many hundreds of lines of code, the programmers each use their
5 own creativity in the same way that there is creativity
6 involved in designing the overall outline. To my mind there is
7 five times as much creativity involved in the lines of code
8 that get you that implementation.

9 So the implementations are not derivative works.
10 They are independent works that simply start with the idea of
11 the specification.

12 And that's the whole point of the clean room, is they
13 go in there with a goal. They are told to work this up.
14 Assuming that is a clean room, each of those are independent
15 compositions. And that is the classic idea versus expression
16 situation and it is not a derivative work in my view.

17 So your point is preserved for appeal.

18 **MR. JACOBS:** Thank you, your Honor.

19 **THE COURT:** All right. Now, what else does anyone
20 want to add in here?

21 There is one thought that I have not yet put in,
22 which I'm going to try to work in and that is one that Oracle
23 has raised several times. Maybe it is in here and maybe I just
24 missed it.

25 I want to make sure that I say that the fact a Google

1 added a lot more additional things to its work would not excuse
2 copying if it did -- infringement, if it did occur. So the
3 work as a whole is the work compared to the copyrighted work.
4 It's not -- it's not compared to Google's additional work. So
5 somewhere I want to make sure I make that point clear.

6 **MR. JACOBS:** And we so request, your Honor.

7 **THE COURT:** All right.

8 **MR. BABER:** Your Honor, may I just comment on that?

9 **THE COURT:** You may.

10 **MR. BABER:** I think that that would be perhaps an
11 appropriate instruction if we did wind up with, let's say, a
12 comparison of 166 API packages to the whole Android platform,
13 but given what you're doing with reducing the size of the works
14 as a whole, you're basically comparing one set of APIs to
15 another set of APIs. And I think the test is just substantial
16 similarity. It's not a question of whether something was
17 added. You don't have the same kind of dynamic of the
18 15 million lines.

19 **THE COURT:** I'll consider what you have to say.

20 Back on the special verdict form. Question 1-A. All
21 right. How does that work for you? Question 1-A.

22 **MR. KWUN:** No objection, your Honor.

23 (Brief pause.)

24 **MR. JACOBS:** Your Honor, this has the "owned by
25 Oracle." I guess the instructions will say that there isn't an

1 ownership issue, but to add in "owned by Oracle" seems to
2 suggest that there is a proof issue here.

3 **MR. BABER:** Why don't we just say "the copyrighted
4 work"?

5 **THE COURT:** I will just say "the copyrighted work."

6 **MR. BABER:** Say again, your Honor?

7 **THE COURT:** "The copyrighted work."

8 **MR. BABER:** Works for us, your Honor.

9 **THE COURT:** All right.

10 **MR. JACOBS:** That's fine, your Honor.

11 **THE COURT:** Okay. Now, on No. 2 I will do somewhat
12 similar parallel language, correct?

13 **MR. JACOBS:** Yes, your Honor.

14 **THE COURT:** And then I take out this long -- this
15 long thing. Old No. 2 comes out.

16 **MR. BABER:** The --

17 **THE COURT:** And now we go to old three, which will be
18 new three.

19 Are these -- I had a question. We have source coded
20 eight Impl Java files, but I thought there were only seven and
21 that there was some other strange file. It would be easier to
22 just say eight.

23 **MR. BABER:** There is eight of them. I think,
24 though --

25 **MR. KWUN:** One of them doesn't have Impl at the end.

1 **MR. BABER:** One he have them doesn't have Impl at the
2 file. We could say the ACL files.

3 **MR. KWUN:** I don't know they all say ACL unless you
4 use the whole path name.

5 **MR. JACOBS:** The seven Impl files, Impl.java files
6 and the single ACL file.

7 **MR. KWUN:** Alternatively, we could just list the
8 eight file names.

9 **THE COURT:** What was that ACL?

10 **MR. JACOBS:** ACL, your Honor.

11 **THE COURT:** How do you spell that.

12 **MR. KWUN:** Capital A, capital C, capital L.

13 **THE COURT:** All right. And the one ACL.

14 All right. With that change, is number three okay?

15 **MR. BABER:** No, your Honor. Have you already changed
16 the burden of proof to conform to the instructions or not? You
17 had it with "Google" on the verdict.

18 **THE COURT:** Okay. "Has Oracle."

19 **MR. KWUN:** "Proven that Google's."

20 **THE COURT:** Then we should -- we should just change
21 that to: "Has Oracle proven that Google infringed its
22 copyright" --

23 **MR. BABER:** That's fine.

24 **THE COURT:** (Continuing) -- its copyright by -- and
25 you do concede it, right?

1 **MR. BABER:** Conceded use, absolutely.

2 **THE COURT:** "And its conceded use of Android in the
3 following items."

4 **MS. ANDERSON:** Yes.

5 **THE COURT:** Can I -- do you all -- can I put in
6 there, just to remind them, paren, "the issue here is
7 diminimus."

8 **MR. BABER:** Why don't we say:

9 "Has Oracle proven infringement by virtue of
10 Google's conceded use of the following items, which
11 Google contends is diminimus," or something like
12 that.

13 **THE COURT:** That's putting the burden on you.

14 **MR. JACOBS:** How about:

15 "Has Oracle proven that Google's conceded use in
16 Android of the following items was not diminimus."

17 **MR. BABER:** We still have the proof -- I don't think
18 that's right.

19 **MR. JACOBS:** That's what you said our burden is, is
20 to prove that it's not diminimus.

21 **THE COURT:** I know. You've got to prove infringement
22 and the burden is on you to prove it's not diminimus.

23 How about:

24 "Has Oracle proven that Google's conceded use of
25 the following files was infringing, the only issue

1 being whether such use was diminimus."

2 How is that?

3 **MR. BABER:** Your Honor, they are not all files. One
4 is a method -- two are methods, two are comments and eight are
5 files.

6 **THE COURT:** I will just then say the following and
7 not say the files:

8 "Has Oracle proven that Google's conceded use of
9 the following was infringing, the only issue being
10 whether such use was diminimus."

11 **MR. JACOBS:** That's fine with us, your Honor.

12 **MR. BABER:** That's fine with us, your Honor.

13 **MR. KWUN:** Your Honor, there is a quote missing after
14 Impl.java.

15 **THE COURT:** Yes, I caught that just a moment ago.
16 Thanks.

17 **MR. BABER:** That should be in C, the second file is
18 CollectionCertStoreParameters, I think.

19 **THE COURT:** Parameters.

20 **MR. KWUN:** Not parametriums. I think it's
21 "parameters." Definitely not parametriums. That's correct,
22 your Honor.

23 **THE COURT:** Sound like parametriums.

24 **MR. KWUN:** We are pretty sure they won't be able to
25 prove that, your Honor.

1 **THE COURT:** Germs. We don't like germs.

2 **MR. JACOBS:** Your Honor, I may have misheard a plural
3 for a singular on 1-A. Could you just reread what you have
4 there?

5 **THE COURT:** 1-A is:

6 "As to all the compilable code for the 37 Java
7 packages in question taken as a group, has Oracle
8 proven that Google has infringed the overall
9 Structure, Sequence and Organization of the
10 copyrighted work."

11 **MR. JACOBS:** Could we add an "s" to "work."

12 **THE COURT:** Fine.

13 **MR. JACOBS:** And then the "all" in the very beginning
14 it's a very strong word. "All the compilable code." I think
15 if it said, "As to the compilable code for the 37 Java API
16 packages in question taken as a group."

17 **THE COURT:** All right. As to compilable code because
18 it says as a group. Okay.

19 Now, I want to go back to No. 4, the blanks. I need
20 you to help me fill in the blanks on the third-party mobile
21 manufacturers.

22 **MR. JACOBS:** We'll have to do some homework, your
23 Honor, on what's in the record. I think there was quite a long
24 list read by Mr. Rubin, I believe, of the Android adopters and
25 I don't know that it matters name by name.

1 **THE COURT:** If it matters at all, it's certainly
2 going to matter name-by-name. I don't know why it matters at
3 all, but if it does matter, then I can see the argument later,
4 "Oh, you only proved it up as to Motorola." "Oh, you only had
5 evidence about" -- or if we don't get a verdict on this.

6 I think this is yet another reason why you lawyers
7 should work this piece out. This is nothing compared to the
8 big issues. And you should take this off the table and not
9 have the jury -- I can see so many reasons why the lawyers
10 would want to simplify this and get it down to the real issues
11 and not let the jury be getting frustrated over something.

12 And don't think that them getting frustrated could
13 lead to a deadlock. It could work the other way. They could
14 say, "You know, why is Google contesting all of this? Of
15 course, they use it. Motorola uses this." Let's say, "They
16 deserve to get hit with \$6 billion."

17 I just think that the lawyers should be sensitive to
18 the burden we're placing on the jury in asking them to come to
19 grips with the things that the jury can appreciate are good
20 issues for them to decide, not give them something that
21 complicated.

22 You have made progress. I'm not being -- I don't
23 mean to be critical because you've taken out that long-winded
24 No. 2. That has a huge step forward. So I ask you to take
25 another step forward on this indirect thing.

1 **MR. KWUN:** Your Honor, we will try to do that, but I
2 suggest in case we don't, in Question 4 you need blanks for
3 "yes" "no" for Parts B and C.

4 **THE COURT:** Yes, I do.

5 **MS. ANDERSON:** A, B and C.

6 **MR. KWUN:** A, B and C.

7 **THE COURT:** Yes, that's a good point. That was just
8 me anticipating that you were going to solve this problem.

9 (Laughter).

10 **THE COURT:** Now, that brings us to the end. I have a
11 lot of work to do here and I'm going to -- I cannot work --
12 I've got to be at the Judicial Conference, supposed to be there
13 now, but I will be there in the morning, all day tomorrow and
14 most of Sunday. So the earliest -- if I don't get it to you
15 today, it will be Sunday night or maybe Monday morning. And I
16 hate to put you in that position, but all I can do is work as
17 hard as I can.

18 **MS. ANDERSON:** I'm sorry, your Honor. There is one
19 quick question for you.

20 You had mentioned the other trial day that the Court
21 was -- instead of issuing instructions and multiple questions
22 on the actual defenses which your Honor will decide, there was
23 one question that you were going to potentially include as a
24 special question which we jotted down, and we wanted to request
25 your Honor to include that.

1 **THE COURT:** What was that question?

2 **MS. ANDERSON:** What I have from the transcript was:
3 "Has Google proven that" -- and you said Oracle and then you
4 said Sun, and I wrote it down as, "Sun or Oracle led it to
5 believe through its affirmative actions that it did not need a
6 license for what it was doing."

7 That is what I had written down.

8 **THE COURT:** Why don't we give that question
9 especially if you all will get rid of No. 4? And it wouldn't
10 be binding, but it would be -- it would be --

11 **MS. ANDERSON:** We can live with your Honor's
12 question. That's fine with us.

13 **THE COURT:** I don't even think we need this in the
14 instructions other than to say it's an advisory special
15 interrogatory and the Court would request that they answer that
16 after they have reached a verdict.

17 **MR. JACOBS:** I think it really understates the
18 requirements for any of the equitable defenses. That's the
19 problem. The legal standard --

20 **THE COURT:** In what way?

21 **MR. JACOBS:** The legal standard knowing --
22 intentional relinquishment of a knowing right. To merely say
23 was there some affirmative step that led Google believe it was
24 off the hook is a pretty thin rule for a finding.

25 **THE COURT:** Well, maybe we could improve on it. I'm

1 going to think about it.

2 Do you have that written down, Ms. Anderson.

3 **MS. ANDERSON:** I do, your Honor.

4 **THE COURT:** Can you hand that up to me --

5 **MS. ANDERSON:** Can I write it a little neater for
6 you? I have terrible handwriting.

7 **THE COURT:** Write it a little neater. I'm not saying
8 yes to it. I'm just saying I'm going to think about it.

9 **MS. ANDERSON:** Thank you. Yes, I will rewrite it
10 right now.

11 **THE COURT:** Counsel, I'm going to adjourn here.

12 **MR. JACOBS:** Real quick. Schedule?

13 **THE COURT:** Yes.

14 **MR. JACOBS:** You will get us the instructions
15 probably Sunday night.

16 **THE COURT:** It could be today. I'm going to try my
17 best to get you a set today. But it is -- it's 50/50. That's
18 the best I can say.

19 **MR. JACOBS:** So we have some things that are due. We
20 have our Rule 50 outlines to you and we have our opposition to
21 their Rule 50 close of plaintiff's case motion. Could we get
22 both to you on Sunday evening?

23 **THE COURT:** Sure. I won't be able to read them until
24 probably Sunday night anyway. How about 3:00 p.m.?

25 **MR. JACOBS:** 5:00 p.m.?

1 **THE COURT:** All right. That's fine. But I just
2 want -- I know I won't read it if it's 5:00 p.m. I will read
3 it the next morning.

4 I just want to be clear on what you can do. You are
5 free, once I give you this set, to put it up on the screen and
6 argue from it. You can put the special verdict form up there
7 and say fill in "yes" or fill in "no."

8 You're free to use these jury instructions, and the
9 only caveat I give you is that if I -- I have to keep this
10 back. If there is something about the way the arguments are
11 structured that I think requires -- justice requires it, I will
12 add an instruction, or maybe even modify one, if I think that
13 some unintended argument is being made that should not be made;
14 that it's exploiting some unintended hidden meaning.

15 In 12-and-a-half years I don't think I've had to do
16 that more than twice. Very rarely does that occur, but I have
17 to hold back that limited possibility.

18 But that small thing being said, I expect you to put
19 up on the screen the instructions that you like and argue from
20 them. That's perfectly okay.

21 Now, you know the rule against sandbagging on the
22 plaintiff's side. Sandbagging means in your rebuttal you can
23 save up half of your time in rebuttal, but in your rebuttal
24 section you cannot go to something -- you can only touch on
25 matters that the other side touched on or that you touched on

1 in your opening argument.

2 You can't -- for example, a classic case is -- we
3 don't have punitive damages here yet, but it would be the
4 plaintiff does not say a word about punitive damages. Defense
5 said, Ah-hah, now I can leave that alone. And then in the
6 closing few minutes the plaintiff's lawyer hammers on punitive
7 damages.

8 That's the classic case of sandbagging. You just
9 can't do it. You've got to bring it up if you want to preserve
10 the right to go back to it. Otherwise, if the other side let's
11 it go, you don't get a second shot at it. But if you leave it
12 alone and they go to it, anything that the defense brings up in
13 there is true rebuttal. That's perfectly okay.

14 **MR. JACOBS:** Thank you, your Honor.

15 **THE COURT:** The other thing that you should be aware
16 of is that professional rules of conduct do not allow you to
17 vouch for witnesses. You know what I mean by that?

18 **MS. ANDERSON:** Yes, your Honor.

19 **THE COURT:** You cannot say, "I believe Mr. So-and-so
20 told the truth." Or, "We believe Mr. So-and-so told the
21 truth." You can say, "Mr. So-and-so told the truth." That's
22 just an argument.

23 But when you suggest that we, as professionals,
24 believe it, you are putting your prestige and your Bar card, so
25 to speak, right there in front of the jury saying, "I'm a

1 professional person. I have been doing cases for 25 years and
2 I'm telling you I believe my client." You can't do that. The
3 rules say you can't do that.

4 You can say "I submit." That phrase is perfectly
5 okay. "I submit he told the truth." You can say that. You
6 can't say "I think" and you can't say "we think," and you can't
7 say "we believe" or "we think." Those are the four big ones.

8 There could be other -- and if you get carried way
9 and you do it once or twice, I'm not going to say a word. But
10 if you do it more than a couple of times, I'm going to say
11 something to you because you must be mindful that it does have
12 an impact on juries if they think the lawyer is going out on a
13 limb and vouching for their credibility.

14 All right. Ms. Anderson?

15 **MS. ANDERSON:** Thank you, your Honor.

16 I tried to write it a little better. It's still not
17 great.

18 **THE COURT:** Hand it to Dawn.

19 (Whereupon, document was tendered
20 to the Court.)

21 **THE COURT:** I'm going to let you all go to work on
22 your closing arguments and hope -- I can't wait to hear them.

23 **MR. JACOBS:** Thank you, your Honor.

24 **THE COURT:** You're most welcome.

25 (Whereupon at 4:33 p.m. further proceedings

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in the above-entitled cause was adjourned
until Monday, April 30, 2012 at 7:30 a.m.)

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CERTIFICATE OF REPORTER

DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certifies that the foregoing proceedings in C 10-3561 WHA, **Oracle America, Inc., vs. Google, Inc.**, were reported by her, certified shorthand reporter, and were thereafter transcribed under her direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR

Saturday, April 28, 2012